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IN THE

Supreme Court of the United States

October Term, 1971.

No. 71- 1020

PHILADELPHIA CHEWING GUM CORPORATION,
Petitioner,

v.

SOMPORTEX LIMITED, BREWSTER LEEDS & CO., INC. and M. S. INTERNATIONAL, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner, Philadelphia Chewing Gum Corporation, prays that a writ of certiorari issue to review the judgment entered in this matter on December 20, 1971, by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported as *Somportex Limited v. Philadelphia Chewing Gum Corporation*, 318 F. Supp. 161 (E. D. Pa. 1970) and is printed in Appendix A to this petition. The opinion of the United States Court of Appeals for the Third Circuit, which is not yet reported, is printed in Appendix B to this petition.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on December 20, 1971. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the principles of comity originally enunciated by this Court in *Hilton v. Guyot*, 159 U. S. 113 (1895) preclude the enforcement by a United States court of an uncontested default judgment entered against petitioner, a Pennsylvania corporation, by the Queen's Bench Division of the English High Court of Justice ("English Court") without examination either of the factual and legal basis of the attempted jurisdiction by the English Court over petitioner by means of extraterritorial service or of the merits of the action?

2. Whether the principles of comity preclude the enforcement of the uncontested default judgment entered by the English Court by a United States court sitting in the Commonwealth of Pennsylvania in view of the inclusion therein of damages (in excess of $60,000 out of a total judgment of $94,387.88), for loss of good will and legal fees, of a nature not recoverable under the laws of the Commonwealth of Pennsylvania?

3. Whether petitioner should have been permitted under Federal Rule of Civil Procedure 14(a) to implead as third party defendants to an action to enforce the default judgment entered by the English Court persons allegedly liable to petitioner on the original contract claim in the English Court, subject to petitioner proving notice to the third party defendants of the pendency of the English Court proceedings?

4. Whether the United States Court of Appeals for the Third Circuit incorrectly read into Federal Rule of Civil Procedure 14(a) a requirement not set forth in the Rule that a third party claim arise out of the same "transaction or occurrence" as the original complaint?

STATUTES INVOLVED.

Federal Rule of Civil Procedure 14(a) provides in pertinent part as follows:

> "At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . . The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. . . ."

STATEMENT OF THE CASE.

This petition arises out of an action commenced by respondent Somportex Limited ("Somportex") in the United States District Court for the Eastern District of Pennsylvania at Civil Action No. 69-1519, to enforce a default judgment obtained by Somportex against petitioner Philadelphia Chewing Gum Corporation ("Philadelphia") in the Queen's Bench Division of the English High Court of Justice ("English Court") (Rec. 5).[1] Jurisdiction was alleged on the ground of diversity of citizenship under 28 U. S. C. § 1332(a)(2) and (c).

Philadelphia filed an answer (Rec. 19), the allegations of which were affirmed by affidavit, denying that the English Court had acquired jurisdiction over Philadelphia or otherwise had power to enter the judgment, and affirmatively alleging that the judgment of the English Court could not be enforced as a matter of comity because of this lack of jurisdiction and for the additional reason that the judgment included elements of damage and costs not recoverable under the public policy of Pennsylvania. The answer further set forth in detail the facts concerning the lack of jurisdiction of the English Court and Philadelphia's multiple defenses to Somportex's claim therein, none of which had been litigated in the English Court, and requested an opportunity to contest these issues, particularly with respect to jurisdiction.

Concurrent with the filing of its answer to the Somportex complaint, Philadelphia filed a third party complaint against respondents Brewster Leeds & Co., Inc. ("Brewster") and M. S. International, Inc. ("M. S.") on the ground that they were liable over to Philadelphia for any

1. All references to "Rec." are to petitioner-appellant's printed appendix in the United States Court of Appeals for the Third Circuit, a certified copy of which has been filed with this Court.

liability incurred by Philadelphia to Somportex on the judgment of the English Court (Rec. 40). Both Brewster and M. S. moved to dismiss the third party complaint on the basis that Philadelphia's claim arose out of the facts underlying Somportex's law suit in the English Court and could not be asserted under Federal Rule of Civil Procedure 14(a) in an action to enforce the judgment obtained in that law suit (Rec. 57, 61). These motions were granted by the District Court, per the Honorable Ralph C. Body, and the third party action was dismissed, without written opinion, by Orders filed January 9, 1970 (Rec. 63, 64). Philadelphia's application to the District Court for a determination and direction, under Federal Rule of Civil Procedure 54(b), that the orders dismissing the third party complaint be made immediately appealable (Rec. 65) was denied on February 18, 1970 by then Chief Judge John W. Lord, Jr., to whom the matter had been assigned permanently (Rec. 67).

Thereafter, on June 5, 1970, Somportex filed a motion for summary judgment against Philadelphia, with supporting affidavits, alleging that the judgment of the English Court was enforceable as a matter of comity without further hearing on the basis of the record before the Court (Rec. 68). Philadelphia answered this motion, also with supporting affidavits, once again raising the defense that the English Court had no jurisdiction to enter the said judgment and that the judgment was otherwise not enforceable as a matter of comity (Rec. 108). The legal issues presented by the motion were fully briefed and argued before Judge Lord, and on October 2, 1970, Judge Lord entered an Opinion and Order determining that the English judgment was enforceable and granting Somportex's motion for summary judgment (Rec. 125). To effectuate this decision, the Court, on October 15, 1970, filed a further order entering

judgment in favor of Somportex and against Philadelphia in the sum of $94,387.88, with interest at the rate of 4% from July 2, 1968 to October 15, 1970 (Rec. 141).

Philadelphia appealed to the United States Court of Appeals for the Third Circuit from the judgment entered pursuant to these orders, as well as from the previous interlocutory order of the District Court dismissing the third party actions against Brewster and M. S. On December 20, 1971 the Court of Appeals filed its opinion affirming the judgment of the District Court in all respects.

The facts as to the English proceedings as set forth in the pleadings in the District Court, are as follows (Rec. 19-25, 72-77, 109-121):

Somportex commenced a law suit against Philadelphia in the English Court on May 15, 1967, based upon an alleged contract to purchase 12,500 cases of bubble gum manufactured by Philadelphia at the total contract price of $112,556.25 and for an exclusive license to sell bubble gum in the United Kingdom under the tradename "Tarzan", which contract was allegedly entered into on Philadelphia's behalf by Brewster, an independent exporter, by means of telephone communications, telegrams and letters exchanged between Somportex and Brewster (Rec. 19-20, 91-94, 119-120).

Philadelphia is a Pennsylvania corporation having its principal place of business in Havertown, Pennsylvania. It is not a resident or domiciliary of the United Kingdom of Great Britain and has never maintained an office, agent or employee, nor has otherwise transacted business in that country, so as to permit personal service upon Philadelphia in England. And no such service was attempted in the English action. Rather, Philadelphia was served with a notice of the Writ of Summons issued by the English Court at its offices in Havertown, Pennsylvania (Rec. 20, 119-120).

Upon service of the notice, Philadelphia, through its attorneys, contacted Clifford-Turner & Co., a firm of English solicitors, to determine whether the English Court was authorized to acquire jurisdiction by means of extraterritorial service and what procedural steps could be taken to protect Philadelphia's rights in the English Court without consenting to the jurisdiction thereof. The English firm was expressly informed that Philadelphia did not want to defend the law suit in England if at all possible (Rec. 21, 110, 115-116). Clifford-Turner & Co. advised Philadelphia's American counsel by telephone that English law permitted extraterritorial service in contract cases under certain limited circumstances but further advised that a conditional appearance could be entered on Philadelphia's behalf in the English Court for the sole purpose of an application to the Court to set aside the Writ of Summons (Rec. 21, 110).

It was the understanding of Philadelphia's American counsel that the conditional appearance could be entered on a conditional basis to preserve Philadelphia's right to contest the jurisdiction of the English Court if such action was determined desirable after reviewing the facts more fully in light of the English law. It was further the understanding of Philadelphia's American counsel that a conditional appearance would not constitute consent to the Court's jurisdiction and could be withdrawn at any time. On the basis of this understanding, Clifford-Turner & Co. was authorized to enter a conditional appearance on Philadelphia's behalf in the English Court, and to apply to that Court to set aside the Writ of Summons issued by the Court (Rec. 21-22, 110-111).

This telephone conversation was confirmed by a letter from Clifford-Turner & Co. (Rec. 117) stating that a conditional appearance would be entered on behalf of Philadelphia "to preserve the status quo." (Rec. 118). The

letter also set forth the circumstances under which an English court is authorized to permit extraterritorial service in a contract action, which are as follows:

> "(f) if the action begun by the Writ is brought against a Defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which—
>
> (i) was made within the jurisdiction, or
>
> (ii) was made by or through an Agent trading or residing within the Jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or
>
> (iii) is by the terms, or by implication, governed by the English Law;
>
> "(g) If the action begun by the Writ is brought against a Defendant not domiciled or ordinarily resident in Scotland or Northern Ireland, in respect of a breach committed within the Jurisdiction of a contract made within or out of the Jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the Jurisdiction that rendered impossible the performance of so much of the Contract as ought to have been performed within the Jursidiction;"

Philadelphia's American counsel thereupon investigated the facts giving rise to Somportex's claim in the English Court and concluded that Brewster had not been authorized to enter into the alleged contract on behalf of Philadelphia and had not done so (Rec. 120).

On the contrary, it appeared that Brewster had been involved in negotiations to sell Tarzan Bubble Gum, which it expected to purchase from Philadelphia, to Somportex solely on Brewster's own behalf and both Brewster and Somportex were made aware that any such sale was dependent upon the approval by the licensor of the tradename "Tarzan," which aproval Somportex had been unable to obtain. Brewster, in conformity with this limitation, had never agreed to the final terms of a sale to Somportex and had not accepted the purchase order sent to it by Somportex as required under Somportex's form (Rec. 26-27, 120). It further appeared that M. S., as agent for the licensor of said tradename, had represented to Philadelphia that it would grant to Philadelphia and its purchaser the right to sell "Tarzan" bubble gum in England and that Philadelphia had relied upon these representations in entering into negotiations with Brewster for the sale of "Tarzan" bubble gum to be resold to Somportex (Rec. 42).

These facts indicated not only that Somportex had no claim against Philadelphia on the merits, but that the English Court had not acquired jurisdiction over Philadelphia, which jurisdiction was dependent upon the existence of the alleged contract. Philadelphia's American counsel determined that no further action should be taken in England on behalf of Philadelphia which might result in Philadelphia having submitted to the jurisdiction of the English Court (Rec. 22, 111).

They were particularly concerned about litigating these issues in the English Court (1) because all the witnesses it would call in its defense were in the United States and not in England, (2) because of the substantial additional expense involved, and (3) because that Court would be prone to find in favor of its own jurisdiction, which in the instant matter would also be a decision on the merits of the action.

At that time no hearing had been held on Philadelphia's application to set aside the Writ of Summons in the English Court and Philadelphia requested Clifford-Turner & Co. to withdraw the conditional appearance previously entered on its behalf in accordance with the understanding of Philadelphia's American counsel that this was permissible. Philadelphia was then advised that the conditional appearance could be withdrawn only by leave of Court, and that if it failed to contest the jurisdiction of the English Court without such leave, the conditional appearance would under English law be converted into a general appearance with respect to the merits of Somportéx's claim (Rec. 22-23, 111-112).

Clifford-Turner & Co. applied to the English Court under a rule of court authorizing such an application for permission to withdraw the conditional appearance entered on Philadelphia's behalf on the ground that such appearance was entered by mistake, relying upon an affidavit of Philadelphia's American counsel (Rec. 34). As a result of this application, Philadelphia abandoned its efforts to challenge the jurisdiction of the English Court. Accordingly, Philadelphia's motion to set aside the Writ of Summons was dismissed by default by a Master of the Queen's Bench Division on November 13, 1967, without prejudice, however, to Philadelphia's application for leave to withdraw its entry of appearance (Rec. 23, 112).

This decision by the Master was appealed by Somportex to a Judge of the Queen's Bench Division who dismissed the appeal, affirming the ruling that the conditional appearance could be withdrawn (Rec. 23, 112).

A further appeal was taken by Somportex to the Court of Appeal of the Supreme Court of Judicature. An initial argument before two judges of that Court resulted in a divided note. The appeal was then argued before three

judges of the Court of Appeal, which although noting that the question was "difficult" and "nicely balanced", nonetheless reversed the decision of the Queen's Bench Division which had allowed defendant to withdraw the conditional appearance entered on its behalf by mistake. *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, [1968] 3 All. E. R. 26, 28, 29 (Rec. 82). The Court of Appeal further affirmed the decision of the Queen's Bench Division dismissing Philadelphia's application to set aside the Writ of Summons. Philadelphia was not permitted to appeal this decision to the House of Lords (Rec. 23-24, 88, 113).

Philadelphia thereupon terminated Clifford-Turner & Co.'s representation of Philadelphia in the English Court and instructed that firm not to take any action on behalf of Philadelphia. In view of these instructions, Clifford-Turner & Co. secured permission from the English Court on March 13, 1968 to cease acting on Philadelphia's behalf (Rec. 24, 113).

On May 20, 1968, Somportex filed a "Statement of Claim" setting forth an alleged cause of action against Philadelphia for breach of contract (Rec. 91). This statement was served upon Philadelphia by mail addressed to Philadelphia's offices in Havertown, Pennsylvania. It included a claim for damages for loss of profits in the amount of 19,062 pounds, 10 shillings and for loss of good will of 25,000 pounds. Philadelphia, having withdrawn the authority of legal counsel to represent it in the English Court and believing that the Court had not acquired jurisdiction over it, offered no defense to this claim and judgment by default was entered against Philadelphia in the amount of 38,562.10 pounds, plus costs (Rec. 10, 24-25, 27, 113-114). Costs were eventually assessed in the amount of 1030 pounds, 7 shillings, 4 pence, which consisted principally of the fees and office expenses of Somportex's solicitors (Rec. 10-13, 29, 114).

It was the opinion of both the District Court and the Court of Appeals that this judgment, including the claim for loss of good will and costs, was enforceable as a matter of comity, notwithstanding any lack of jurisdiction in the English Court originally or lack of any hearing with respect thereto, solely on the basis of Philadelphia's entry of a conditional appearance to challenge the jurisdiction of the English Court and the decision of the Court of Appeal of the Supreme Court of Judicature that the said conditional appearance could not be withdrawn, as permitted under the English rules, on the ground of mistake.

As a result of this decision as to the effect of the conditional appearance, the courts below, although conceding that there had never been a hearing (1) as to the validity of the English Court's attempt to acquire jurisdiction by extraterritorial service or (2) as to the merits of Somportex's claim, determined that it was unnecessary to make an independent examination of the factual questions raised by Philadelphia for summary judgment. This result was justified by the Court of Appeals on the reasoning that Philadelphia, having failed in its attempt to withdraw the conditional appearance, should have litigated these issues in the English Court, and was bound by the judgment entered in default thereof to the same extent as it would be bound by a similar judgment entered by a court of one of the states under the full faith and credit clause of the United States Constitution (U. S. Constitution, Article IV, Section 1).

The Court of Appeals further sustained the dismissal of Philadelphia's third party complaint against Brewster and M. S. on the ground that Philadelphia's claim against the third party defendants arose solely out of the alleged contract with Somportex, not the default judgment, and therefore failed to meet what was termed the "transaction or occurrence" requirement of Federal Rule of Civil Procedure 14(a). In so limiting the scope of Philadelphia's

claim, the Court of Appeals cavalierly concluded that neither third party defendant was "notified of the proceedings in the English Court," although there was no evidence to this effect in the record and Philadelphia had never been given an opportunity to amend its third party complaint to allege notification.

REASONS FOR ALLOWING WRIT.

Certiorari should be granted to review the decision of the United States Court of Appeals for the Third Circuit in the instant action because:

1. The decision of the Court of Appeals upholding the enforcement of the uncontested default judgment against Philadelphia by the English Court without examination either of the factual and legal basis of the attempted jurisdiction by the English Court over Philadelphia by means of extraterritorial service or of the merits, solely on the basis of the ruling of the English appellate court as to the effect of the entry of the conditional appearance by Philadelphia in the English Court, constitutes an improper extension of the principles of comity originally enunciated in *Hilton v. Guyot*, 159 U. S. 113 (1895), which is (a) *unsupported by any other authority, state or federal*, and (b) is contrary to the English decisions relating to the recognition of foreign judgments, and which should therefore be reviewed by this Court.

2. The decision of the Court of Appeals upholding the enforcement of the default judgment entered in the English Court, which judgment includes damages, in excess of $60,000, for loss of good will and costs for legal fees, of a nature not recoverable under the laws of the Commonwealth of Pennsylvania, constitutes an improper extension of the principles of comity *which is unsupported by any other authority* and which should therefore be reviewed by this Court.

3. The decision of the Court of Appeals in affirming the dismissal of Philadelphia's third party complaints against Brewster and M. S. on the ground that the third party claims did not arise out of the same "transaction or occurrence" as the original complaint, i.e., the default

judgment, reads into Federal Rule of Civil Procedure 14(a) a requirement not set forth in the Rule or otherwise supported by judicial interpretation and constitutes an adjudication of an important question of federal procedure which has not heretofore been, but should be, reviewed by this Court.

4. The decision of the Court of Appeals affirming the dismissal of Philadelphia's third party complaint on the ground that the third party defendants, although allegedly liable to Philadelphia on Somportex's original contract claim in the English court, could not be liable to Philadelphia on the judgment arising out of the English Court proceedings, without giving Philadelphia an opportunity to prove notice to the third party defendants of the pendency of the English Court proceedings, constituted an adjudication of an important question of federal procedure which has not heretofore been, but should be, ruled upon by this Court.

A. The Court of Appeals Improperly Upheld the Enforcement of the Judgment of the English Court Under the Doctrine of Comity.

1. The Question Decided by the Court of Appeals Is a Significant One Which Should Be Reviewed by This Court.

It is undisputed that the default judgment entered by the English Court was not enforceable as a matter of obligation, or full faith and credit, as are the judgments of the courts of the other forty-nine states, but only as a matter of comity, *Hilton v. Guyot, supra, Christoff Estate*, 411 Pa. 419, 422-23 (1963), cert. denied, 375 U. S. 965 (1964). The novelty of the decision below lies in the determination that the said judgment was enforceable under the doctrine

of comity without an independent examination into the legal and factual basis for the attempted extraterritorial jurisdiction of the English Court and despite the inclusion therein of damages for loss of good will and costs for legal fees. This determination is not only contrary to the English decisions and other authorities which have considered the issue, as is more fully discussed below, but is admittedly *without judicial precedent whatsoever* in the reported decisions of this country, thereby necessitating review by this Court.

Moreover, in view of the present day trend of increased international and multi-national commercial transactions and other contacts, which is certain to result in a growing number of attempts by foreign courts to secure jurisdiction over United States citizens, it is incumbent that *uniform judicial standards be established* for the enforcement of foreign default judgments by the United States federal and state courts, *a function which can be performed only by this Court.*

Although the jurisdiction of the court below was based on diversity of jurisdiction and the judgment of the English Court was held enforceable purportedly on the basis of Pennsylvania law, the Pennsylvania courts, as have the courts of the other states, continue to rely upon the exhaustive opinion of this Court in *Hilton v. Guyot, supra*, in applying the doctrine of comity to the enforceability of foreign judgments, *Christoff Estate, supra.* It is now over seventy-five years since the Court rendered its decision in *Hilton* defining the principles of comity. The Court should take this opportunity to consider whether the principles set forth in that decision, as adopted by the Pennsylvania courts, should be restated or expanded in the light of changed conditions. At the very least, this Court should determine whether the courts below properly extended the doctrine of comity enunciated in *Hilton* to the instant case.

2. Under the Doctrine of Comity, the Courts Below Were Required to Examine the Factual and Legal Bases of the Jurisdiction of the English Court.

The principles of comity are analyzed and discussed fully in *Hilton v. Guyot*, and are summarized in the following passage quoted by the Pennsylvania Supreme Court in *Christoff Estate* (411 Pa. at 423):

> "It must, however, always be kept in mind that it is the paramount duty of the court, before which any suit is brought, to see to it that the parties have had a fair and impartial trial, before a final decision is rendered against either party. When an action is brought in a country against one of our own citizens . . . *and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and the parties*, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, *unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given credit and effect.*" (Emphasis added.)

In *Hilton*, the Court refused to permit the enforcement of the judgment before it because of lack of reciprocity by the foreign country involved (France) in enforcing judgments of United States courts. More relevant hereto, the Court, throughout its opinion, reiterated that only judg-

ments of courts of competent jurisdiction were enforceable, and quoted (159 U. S. at 189-90) extensively from Story's Commentaries on the Conflict of Laws, Sections 607, 608, to the effect that the jurisdiction of the adjudicating court and its power over the parties and the things in controversy may always be inquired into. See also *Thompson v. Whitman*, 85 U. S. (18 Wall.) 457, 461 (1874), where the Court noted that "... as to a foreign judgment, it is perfectly well settled that the inquiry is always open, whether the court by which it was rendered had jurisdiction of the person or the thing." And in the case of *In Re Dulles*, [1951] Ch. 842, 849, 2 T. L. R. 145, 148, the Master of the Rolls of the English Court of Appeal expressed his understanding of the principles of comity followed by the common law courts as follows:

> "... [A]s I understand the principles of private international law applied in these Courts, a foreign judgment can be treated as so conclusive if, *inter alia*, it was pronounced by a Court of competent jurisdiction, and the question of the Court's competence will, *prima facie*, I should have thought, be opened to the consideration of our own Courts."

This continues to be the desirable rule with respect to the enforceability of foreign judgments, whether the judgment was entered by default, after entry of appearance as in the instant matter, or even after a hearing by the rendering court as to its own jurisdiction, as is more fully explained in the following excerpt from a recent law review article on the subject by two leading authorities on international law, Von Mehren and Trautman, *Recognition of Foreign Adjudications: A Survey and Suggested Approach*, 81 Harv. L. Rev. 1601, 1624-29 (1968):

". . . . Reexamination of the facts would serve the hallmark function of jurisdictional tests by checking the rendering system's processes in the area of fact-finding. In addition, it ensures that the rendering court was, from a disinterested point of view, an appropriate forum to determine the rights and duties of the persons affected. . . . Finally, the bootstrap argument is available: if the requested court's jurisdictional standard for recognition purposes was not actually satisfied, in its view the rendering court lacked 'power' to proceed.

"If the findings of fact were made in a default judgment, it is clear that the requested court will review them for purposes of determining whether the rendering court had jurisdiction in the international sense. . . .

". . . . To the extent that the jurisdictional test reflects a nonfunctional, bootstrap argument, a nondefault judgment would seem to stand upon the same basis as a default judgment. *The fact of appearance need not affect the determination whether the court had 'power'.* What appears to have been the traditional view of Anglo-American practice—that jurisdictional facts could always be examined—can probably be explained as the simple, logical consequence of the power premise, reflected also in the traditional view that personal service was the normal basis for assuming jurisdiction.

". . . . [P]*resumably the better rule for general international practice today is still to permit review of findings of jurisdictional facts even in nondefault cases in*

the absence of treaty arrangements." (Emphasis added.)

Von Mehren and Trautman also point out in their Article that the rule is now different as to the enforcement of inter-state judgments within the United States under the Full Faith and Credit Clause of the Constitution, but that the factors justifying the change as to internal law, *e.g.*, availability of an appeal to this Court, do not exist with respect to international law (81 Harv. L. Rev. at 1623-27). This distinction between the enforcement of judgments under the principles of full faith and credit and comity has been affirmed by the Pennsylvania Supreme Court in *Christoff Estate*. In the absence of any state court ruling to the contrary, it is evident that Pennsylvania would continue to follow the traditional international rule as set forth in *Hilton v. Guyot* and *Thompson v. Whitman* that the jurisdictional facts of the foreign court rendering the judgment to be enforced are always subject to review by the enforcing court.

Applied to the instant matter, the rule *required* the courts below to determine whether the English Court acquired jurisdiction over Philadelphia by means of extra-territorial service, and to make an independent examination of the facts concerning Philadelphia's contacts with England under the English rules permitting such service. These facts, which depend upon the existence of the alleged contract, are *obviously in dispute* between the parties, and Philadelphia is entitled to a hearing thereon.

3. Philadelphia's Entry of a Conditional Appearance Was Insufficient to Confer Jurisdiction on the English Court.

The courts below did recognize a duty, in accordance with the doctrine of comity, to make some examination as to

the jurisdiction of the English Court, but limited their responsibility in this respect to a determination that Philadelphia's entry of a conditional appearance in the English Court constituted a full submission to the jurisdiction of that court, thereby foreclosing any further review of the original basis of the English Court's jurisdiction. This conclusion was mandated, in the view of the courts below, by virtue of the *English* rules of procedure which automatically convert a conditional appearance to a general appearance, if jurisdiction is not challenged within a specified period of time, and the decision of the English appellate court in refusing Philadelphia's application to withdraw its conditional appearance on the ground of mistake.

The *simple* answer to this question is found in the excerpts from the Von Mehren and Trautman article quoted above to the effect *that an entry of appearance to contest jurisdiction by itself does not confer jurisdiction in the court for the purposes of comity* and the enforcement of foreign judgments under international law, nor release the enforcing court of the obligation to determine the underlying jurisdiction of the court entering the judgment. See also Cheshire, *Private International Law*, 647 (6th ed. 1961), where the author discusses the effect of an entry of appearance to contest the jurisdiction of a foreign court on the enforceability of a judgment entered by a foreign court:

> ". . . [I]t can be said with some assurance that to protest is not necessarily to submit. The tide is setting in the opposite direction. In the converse case, where the question is whether a non-resident has submitted to the English court, the judges have refused to regard an appearance as voluntary where all that the defendant has done has been to deny his amenability to the jurisdiction. Thus, Lord Merivale in *Tallack v. Tallack* [(1927) P. 211, 43 T. L. R. 467] repudiated the

suggestion that an appearance, 'qualified by a distinct and reasoned denial of the existence of jurisdiction, could with any propriety be regarded as a submission to the exercise of the jurisdiction so denied'. In the later case of *In re Dulles*, the Court of Appeal confirmed this view and again held that to object to the international competence of the court is not in itself a submission to the jurisdiction. In the words of Denning L. J. [(1951) Ch. at 850, 2 T. L. R. at 149]:

> 'I cannot see how anyone can fairly say that a man has voluntarily submitted to the jurisdiction of a court where he has all the time been vigorously protesting that it has no jurisdiction. If he does nothing and lets judgment go against him in default of appearance, he clearly does not submit to the jurisdiction. What difference in principle does it make if he does not merely do nothing, but actually goes to the court and protests that it has no jurisdiction? "I can see no distinction at all." '

If, as Lord Denning indicates, a defendant who actually contests the jurisdiction of a foreign court does not thereby submit himself thereto, there certainly can be no such submission where, as here, the defendant has *not* contested the jurisdiction of the foreign court, nor the merits of the claim. The opposite conclusion reached by the courts below in the instant matter results in a *gross injustice to Philadelphia*, contrary to the teachings of the Pennsylvania Supreme Court in *Christoff Estate*, in that it imposes upon Philadelphia an obligation to pay a judgment entered by a foreign court *whose jurisdiction has never been litigated*. It is unjust, moreover, to hold, as did the courts below, that Philadelphia was bound by its initial decision to file a conditional appearance challenging the jurisdiction of the English Court in England, which was made tentatively to

preserve the status quo pending a further determination of the facts, although Philadelphia had abandoned its efforts in this respect, *prior to a hearing thereon*, as soon as all of the facts surrounding the transaction could be developed.

The decisions of the courts below cannot be justified, as has been attempted, on the basis of the English rules providing for the treatment of a conditional appearance objecting to jurisdiction as a general appearance. *These rules refer solely to the internal procedure* of the English courts as a result of the entry of such an appearance within that court system; they do *not* relate to the obligation of a court *in another country*, in enforcing the judgment of an English court under the international doctrine of comity, to review the jurisdictional basis for the judgment aside from any entry of appearance made by the defendant to contest the jurisdiction of the English court.

The courts below, for the same reason, erred in finding that the decision of the English Court of Appeal in disallowing Philadelphia's application to withdraw the conditional appearance was conclusive as to the fact that Philadelphia had submitted to the jurisdiction of the English Court generally. That decision stands solely for the proposition that the conditional appearance could not be withdrawn under the *English* rules of procedure and the English proceedings could continue notwithstanding Philadelphia's lack of participation therein. *It did not purport to render any adjudication as to the effect of the appearance for the purpose of international enforcement* of the judgment rendered by the English trial court nor to substitute the appearance as the basis for the jurisdiction of the English Court. On the contrary, the English Court of Appeal specifically ordered that the original writ of summons "will therefore stand" (Rec. 132), thus acknowledging that the jurisdiction of the English Court rested in the last analysis on the attempted extraterritorial service, not the entry of appearance.

Moreover, to the extent that the decision does constitute an adjudication that Philadelphia did consent to the jurisdiction of the English Court in an international sense by entering an appearance solely to object to jurisdiction, it is likewise subject to re-examination, at least as to the factual question of mistake, in accordance with the principles of comity hereinbefore discussed, and was not entitled to the conclusive effect given it by the courts below.

It is clear from the above that the judgment of the English Court cannot be enforced under the doctrine of comity as a matter of law without an independent examination being made of the facts underlying the purported jurisdiction of the English Court, and that *the limited inquiry made by the courts below with regard to jurisdiction was not sufficient.*

4. The Judgment of the English Court Cannot Be Enforced Because It Includes Substantial Damages for Loss of Good Will and Costs for Attorneys' Fees and Office Expenses.

The opinion in *Hilton v. Guyot* stated that there were circumstances other than lack of jurisdiction which would justify an American court refusing to enforce a judgment of a foreign court under the principles of comity. One of the circumstances recognized by the courts for not enforcing a foreign judgment is if an ". . . action on the original foreign claim could not have been maintained because contrary to the public policy of the forum." Restatement, Conflict of Laws, § 445. Moreover, a Pennsylvania court in determining whether or not to enforce a foreign judgment is obligated to "ensure that justice is done." *Christoff Estate,* 411 Pa. at 423.

This is particularly relevant here since the judgment of the English Court includes as an item of awarded damage

the loss of good will by Somportex (25,000 pounds) and as an item of cost, attorneys' fees and office expenses (1030 pounds, 7 shillings, 4 pence). The total value of these items alone in American money *is in excess of $60,000,* a substantial portion of the judgment in the amount of $94,387.88, entered herein by the District Court. These items are not recoverable directly under Pennsylvania law as a matter of public policy, *Harry Rubin & Sons, Inc. v. Consolidated Pipe Co.,* 396 Pa. 506 (1959) (good will); *Shapiro v. Magaziner,* 418 Pa. 278 (1965) (attorneys' fees). *They therefore should not be allowed to be recovered indirectly as part of a foreign judgment.* Any other conclusion would permit an exception to the public policy set forth in the above cases not previously sanctioned by the Pennsylvania Supreme Court and *would defeat, not ensure, the ends of justice.*

Indeed, the inclusion of these items in the judgment of the English Court produces a gross injustice. In the first place, the English Court, upon the allegation of Somportex, awarded damages for loss of profits of approximately $32,500, an *unlikely thirty percent* of the total alleged contract price of $112,500. Whatever the substantiation for such an excessive award for loss of profits, it becomes *unconscionable* by adding thereto a further sum in excess of $60,000, principally for loss of good will, almost double the alleged loss of profits. As a result, the amount in judgment is close to the *full contract price* for the 12,500 cases of bubble gum.

Even more inequitable, the judgment not only restores Somportex to the financial position it would have been in had it secured the contract and had made the estimated profit, it awards Somportex a windfall by *tripling* the dollars which it would have had by a full and complete performance of the alleged contract by Philadelphia. Such a

result should not, and cannot, be sanctioned under the guise of "comity."

The courts below acknowledged that they could not enforce a foreign judgment which violated the public policy of Pennsylvania and that loss of good will and attorneys' fees cannot generally be recoverable as damages in suits instituted in Pennsylvania, but held that the inclusion in a foreign judgment of such items of damage did not constitute a violation of public policy as to prevent enforcement of the judgment. In view of the gross inequities resulting therefrom, that conclusion is clearly contrary to the strong policy expressed in *Christoff Estate* to apply comity so as to ensure justice, and constitutes a further unprecedented and improper extension of that doctrine.

B. Philadelphia's Third Party Complaint Was Improperly Dismissed Under Federal Rule of Civil Procedure 14(a).

The purpose of Federal Rule of Civil Procedure 14(a) is to avoid circuity and multiplicity of actions, and it has been interpreted broadly to permit the institution of a third party complaint even though the theory of liability therein may be different than that set forth in the original complaint. *American Fidelity and Casualty Co. v. Greyhound Corp.*, 232 F. 2d 89 (5th Cir. 1956); *Jones v. Waterman S. S. Corp.*, 155 F. 2d 992 (3d Cir. 1946); *Aetna Casualty and Surety Co. v. Kochenour*, 45 F. R. D. 248 (M. D. Pa. 1968). Although there must be some showing that under the applicable law the third party may be liable over to the defendant, "the allegations of the third-party complaint need not show that recovery is a certainty; the complaint should be allowed to stand if, under some construction of the facts which might be adduced at trial, recovery would be possible." *Wilkie v. United States*, 279

F. Supp. 671, 673 (N. D. Tex. 1968); 3 Moore, Federal Practice ¶ 14.10, at 555.

Philadelphia, it is submitted, did set forth a sufficient showing of liability on the part of both Brewster and M. S. to sustain the institution of its third party complaint. The liability of Brewster was expressly based upon the allegation that Brewster was not authorized to enter into the alleged contract underlying Somportex's English judgment on Philadelphia's behalf and was acting solely on its own behalf, as Philadelphia's exporter, to sell Somportex gum to be purchased from Philadelphia. A party to a contract, such as that which may exist between Philadelphia and Brewster, is liable to indemnify the other party for any liability incurred by the other party as a result of any improper or unauthorized performance under the contract. *Parsons Trading Co. v. Dohan*, 312 Pa. 464 (1933); *Behar v. Savard*, 21 F. Supp. 367 (S. D. N. Y. 1938); Restatement, Agency, 2d, § 383, Comment (e).

The basis of M. S.' liability is somewhat different in that it rests upon M. S.' representations, as agent for the licensor of the tradename "Tarzan", that Philadelphia and its purchaser would have the right to distribute bubble gum under said tradename in England, on which Philadelphia relied in negotiating to sell its gum to Brewster for resale to Somportex. There is obviously a right of indemnity against M. S. for any damages incurred by Philadelphia in reliance upon M. S.' representation. *Aresto v. Milic*, 184 Pa. Super. 114 (1957) (insurance agent's representation as to coverage).

The Court of Appeals expressly recognized that the third party action, which was based on the alleged contract underlying the default judgment of the English Court, would have been proper had Somportex been required to litigate the factual questions relating to the al-

leged contract. Having concluded to the contrary as to Somportex's burden, the Court found Philadelphia's third party complaint defective for failure to meet the "transaction or occurrence requirement of Federal Rule of Civil Procedure 14(a)" in that the transaction at issue in the main action was not the contract, but the judgment of the English Court.

Rule 14(a) does not, however, limit third party complaints to claims arising out of the same transaction or occurrence as the planitiff's claim; the only requirement being that the third party defendant shall be liable over to the defendant third party plaintiff for all or part of plaintiff's claim. The term "transaction or occurrence" applies only in the later portions of Rule 14(a) applicable to claims between the third-party defendant and the original plaintiff. *Exhaustive research reveals no other federal decision extending this test,* as did the Court of Appeals herein, to justify the dismissal of a third party complaint under the first sentence of Rule 14(a). It is clear, therefore, that the Court of Appeals has read into this very important procedural Rule a requirement not set forth in the Rule or otherwise supported by judicial predecent, and the Court's decision in this respect should be reversed by this Court for this reason alone.

The Court of Appeals further rejected the appropriateness of Philadelphia's third party complaint to the extent that Somportex's claim was based on the default judgment of the English Court on the ground that "neither third party defendant was involved in or notified of the proceedings in the English Court." This assertion is completely without support in the record. The third party complaint was drafted in full confidence that the English Court had not acquired jurisdiction over Philadelphia and that Somportex would be required to prove in the District

Court its underlying contract claim. The allegations of the complaint therefore relate principally to the scope of the third party defendants' liability to Philadelphia on the merits of the contract claim and were not intended expressly to meet the issue of notification, which Philadelphia did not believe to be in dispute.

Neither Philadelphia nor the third party defendants have ever made averments or introduced evidence to the effect that the third party defendants did not receive notification. Rather Philadelphia has throughout these proceedings stated that notice of the English action was given to the third party defendants and it was prepared to amend the third party complaint to so aver. At no time however did the courts below give Philadelphia an opportunity to amend its third party complaint or to pursue its claim against Brewster and M. S. for liability arising out of the default judgment in the English Court. This failure will require Philadelphia to institute a new and separate lawsuit to assert its right to indemnity contrary to the clear purpose of Rule 14(a) to avoid multiplicity of litigation, providing an additional reason for this Court to review the decision of the courts below.

CONCLUSION.

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

DISTRICT COURT OPINION AND ORDER.

JOHN W. LORD, JR., *Ch. J.* October 2, 1970.

Before the Court in the above-captioned case is plaintiff's motion for summary judgment. The case presents an interesting and somewhat unique situation involving the enforceability of a foreign judgment which was acquired in England by the plaintiff, Somportex, Ltd. Counsel for both plaintiff and defendant have ably briefed and argued their respective positions.

A summary of the somewhat complex factual background will be helpful. In May 1967, plaintiff, a British Corporation, instituted suit against the defendant, Philadelphia Chewing Gum Corporation, an American Corporation, for an alleged breach of contract. It obtained leave of the Queen's Bench Division of the High Court of Justice in England to issue a writ of summons against the defendant and to serve notice on defendant at its offices in Havertown, Pennsylvania. After receipt of this notice, consultation with its American counsel, who in turn consulted a British firm of solicitors, defendant, on August 9, 1967, entered a conditional appearance in England. This action was taken without prejudice to an application to set aside the writ.[1] On August 18, 1967, within the permissible time period, defendant sought an order having the writ and the service of the writ set aside for lack of jurisdiction. In its summons, the defendant alleged that there was no contract between the parties, or alternatively, that if there was an agreement,

1. R. S. C., Ord. 12, r. 7 & 8 state that a conditional appearance shall be treated for all purposes as an unconditional one unless the party moves within fourteen (14) days for an order having the writ set aside.

it was not made in Great Britain, nor by an agent of the defendant who traded or resided in England, nor by its terms or implication was to be governed by English law.[2] Due to the summer recess no hearing was set until November 13, 1967. During this three month period, defendant changed its strategy and, not wishing to do anything which might result in its submitting to the English court's jurisdiction, decided to withdraw its appearance altogether. The first summons to come before the master was defendant's summons to have the writ set aside. In accord with its new plan of action, defendant did not pursue this summons and the master, by default, dismissed it. However, the master further ordered that the order not be drawn up for seven days so as to allow defendant the opportunity to withdraw its appearance. On November 17, 1967, the defendant, alleging that its conditional entrance of appearance was based on mistake, applied to the court to allow it to withdraw.[3] This request was granted by the master on November 27, 1967, which order also set aside the November 13th order dismissing the defendant's summons. On January 17, 1968, Judge Milmo of the Queen's Bench Division dismissed plaintiff's appeal from the master's order. Plaintiff appealed this decision to the Court of Appeal of the Supreme Court of Judicature. The two judges of that court who initially heard the appeal were unable to agree upon a result. Thereafter, on February 27, 1968, the court, this time composed of three judges, unanimously reversed the Queen's Bench and master's decision and held that defendant's conditional appearance was not entered by mistake but rather was "a wise course of action deliberately

2. These are the grounds which, under English law, would permit the granting of a writ of summons and authorizing it to be served extraterritorially.

3. R. S. C., Ord. 21, r. 1 provides: A party who has entered an appearance in an action may withdraw the appearance at any time with leave of the court.

decided on by eminent firms in England and the United States after consultation." *Somportex, Ltd. v. Philadelphia Chewing Gum Corp.*, [1968] 3 All E. R. 26, 29. The court therefore ordered the appearance to stand, as well as the original November 13th order of the master which dismissed the defendant's summons which sought to have the writ and its extraterritorial service set aside. The court, however, did grant the defendant an extension of time within which it could appeal the master's order of November 13th which was given in default. At this juncture defendant took no further steps in England except to have its British solicitors withdraw from the case. On May 28, 1968, Somportex filed in the English court a "Statement of Claim" setting forth the alleged cause of action against the defendant for breach of contract. This statement, along with a letter from Somportex's solicitors explaining the posture of the case, was served on the defendant at its Havertown offices. The defendant acknowledged receipt of these papers but took no further steps to defend the action. This course of action resulted in a default judgment being granted against the defendant. On July 1, 1969, plaintiff instituted suit in this Court to enforce the default judgment obtained in England.[4]

As the Court noted earlier, this factual background has resulted in a rather unique situation. Most problems relating to the enforcement of foreign money judgments arise out of one of two fact situations. The first situation arises where the defendant, even though he has notice that a suit has been instituted against him in the foreign country, takes

4. At the same time defendant answerd the complaint it filed a third-party complaint against the third-party defendants. On November 14, 1969, Judge Body of this Court dismissed the third-party complaints against Brewster Leeds & Co., Inc., and M. S. International, Inc. Chief Judge Lord, on February 18, 1970 denied defendant's motion for a determination under Rule 54(b) of the Federal Rules of Civil Procedure.

no action to defend the suit in that country. In this situation, the foreign court would find jurisdiction and enter a default judgment on the merits. Thereafter, when the successful plaintiff attempted to enforce this judgment in the United States, it is clear that the defendant would be able to collaterally attack the finding of jurisdiction by the rendering court. This would necessitate an examination by the enforcing court of the underlying facts which allegedly supported the finding of jurisdiction. Transposed to the facts of the instant case, if defendant, Philadelphia Chewing Gum, had taken no steps whatsoever to defend the suit in England, and a default judgment on the merits was entered against it, the defendant would be entitled to collaterally attack this judgment in Somportex's present action designed to enforce the English judgment in this Court.

The second situation is where the defendant enters an appearance in the foreign court which is designed solely to attack the court's jurisdiction, litigates the issue, loses and then takes no further action to defend the merits of the case. The foreign court, having determined that jurisdiction existed would then continue with the merits and enter a default judgment. When the plaintiff attempted to enforce the judgment in the United States, there is some question whether or not a United States court would look beyond the judgment to the already litigated issue of jurisdiction. If the judgment were that of a sister state, rather than a foreign judgment, then the requested court could not relitigate the issue of jurisdiction. *Sherrer v. Sherrer*, 334 U. S. 343 (1948). The Restatement (Second) of Conflict of Laws § 98 & comments c and d calls for the recognition and enforcement of a foreign judgment in these circumstances. Utilizing the Restatement approach and applying these facts to our case if the defendant had litigated the issue of jurisdiction, i.e. was there a contract that was to be governed by English law, this Court would not reexamine that determination.

The fact situation in the instant case presents a different situation. Unlike the first situation, the defendant has taken some action in England. Philadelphia Chewing Gum entered a conditional appearance, which after final litigation on the question of whether the appearance was entered by mistake, has since become a general appearance.[5] However, unlike the second situation, the defendant has not litigated the underlying jurisdictional basis for the suit. Therefore the Court is confronted with a situation which falls somewhere between the more usual situations.

The issue of whether or not a foreign judgment will be enforced by a federal district court, having jurisdiction by means of diversity, is governed by the law of the state where the federal court is located. *Erie R. R. Co. v. Tompkins*, 304 U. S. 64 (1938); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941); *Svenska Handelsbanken v. Carlson*, 258 F. Supp. 448 (D. Mass. 1966). Therefore the instant case is controlled by Pennsylvania law under which it is clear that the basis for enforcing foreign money judgments is comity, not full faith and credit. *Christoff Estate*, 411 Pa. 419 (1963), *cert. denied* 375 U. S. 965 (1964); *Commonwealth ex rel. v. Yarnell*, 313 Pa. 244 (1933). While comity is a nebulous term and the incantation of the term by itself sheds little light on the subject, the Supreme Court, in the landmark case of *Hilton v. Guyot*, 159 U. S. 113 (1895), has defined it as "neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* at pp. 163-164. The Supreme Court of Pennsylvania further quoted the *Hilton* decision:

5. See note 1 *supra*.

". . . When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens . . . and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged, and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it should not be given credit and effect." *Christoff Estate, supra* at 423 quoting *Hilton v. Guyot, supra* at p. 205.

In its brief plaintiff suggests that this Court need not look beyond the default judgment except to satisfy itself that the requisite preconditions for the enforcement of a foreign judgment, as espoused in *Hilton v. Guyot, supra,* have been met. While we agree that the Court need not look beyond the foreign judgment and examine the merits, it is clear that, under accepted practices of comity, an enforcing court should satisfy itself that the rendering court had, in the international sense,[6] jurisdiction over the defendant. This Court finds that the rendering court, the Queen's Bench Division of the High Court of Justice, had

6. While a nation may have jurisdiction over a party pursuant to its local rules, it is possible that the rule on which the foreign court bases its judgment would not be recognized by other nations as sufficient so as to enable them to enforce a judgment based on it. A common example of such a local rule is Article 14 of the Civil Code of France (1804) under which the French nationality of the plaintiff is a sufficient ground for jurisdiction.

personal jurisdiction over the defendant by means of the defendant's appearance, albeit originally designed to attack jurisdiction, which it made in the foreign court. Moreover, it is clear that one of the acceptable bases of jurisdiction which enforcing courts will recognize as a basis for enforcing a foreign judgment is a voluntary appearance in the rendering court by the defendant.

In reaching this decision, which is only one of the requisite conditions for our recognizing and enforcing the English judgment, the Court has utilized a two-step approach which we find is necessitated by the peculiar facts of the case. First, as has been stated, the Court recognizes that it must be satisfied that the rendering court had jurisdiction in the international sense to grant the judgment. The Court finds this to be particularly true where the jurisdictional basis on which the original suit was based—that there was a contract which was to be governed by English law—has never been litigated. In this respect our case, and the Court's approach to the problem, parallels the situation where the defendant chooses not to litigate in the foreign court, but rather chooses to collaterally attack the judgment when it is pleaded in the United States. However, unlike the situation where the defendant has made no effort to defend in the foreign court, the defendant in this case has litigated the issue of its appearance. The Supreme Court of Judicature, in a unanimous opinion held that "no mistake has been shown such as to warrant our allowing this appearance to be withdrawn. I would therefore allow the appeal [reversing the Queen's Bench Division and the master]. The appearance will stand. So will the original order which was made by the master on November 13 dismissing the application to set aside. The writ will therefore stand." *Somportex, Ltd. v. Philadelphia Chewing Gum Corp., supra* at 29. The decision that unless defendant took steps to quash

the writ,[7] it had submitted itself to the court's jurisdiction, was the product of extended litigation in which both sides were represented by prominent counsel. Since the English court's default judgment was based on having personal jurisdiction through the appearance of the defendant, and not on the underlying jurisdictional claim, the fact that this issue was fully litigated makes our case similar to the second situation. Therefore, rather than making an independent determination of jurisdiction which the Court would normally do where there is a default judgment and since the underlying jurisdictional issue has never been litigated, the second step in our approach will be to give conclusive effect to the English court's determination that defendant made a knowing choice to enter an appearance which, by virtue of English law and the failure of the defendant to pursue its motion to quash the writ, became a general appearance.

In adopting the English court's findings and utilizing them rather than making an independent examination of jurisdiction, this Court feels that it is acting in accord with the overall objectives of comity. The Supreme Court of Pennsylvania has said in this regard that Pennsylvania courts will treat the judgments of foreign courts with the greatest respect, keeping in mind however, that the primary duty of a court is to see that justice is done. *Christoff Estate*, *supra* at p. 423. In this case the Court feels that it is able to accommodate both these objectives. By recognizing and applying the English court's finding that the defendant submitted itself to the court we are holding in high esteem the judgment of the foreign court. In afford-

7. Lord Denning, M. R. went on to say immediately after the above-quoted passage that "[o]n the other hand, if the American company would wish to appeal from the order of Nov. 13, I see no reason why the time should not be extended and they can argue that matter [the underlying jurisdictional issue of whether there was a contract which was to be governed by English law] out at a later date if they should so wish."

ing the English judgment the effect that we have, we are, of course, mindful that the system which rendered it is the very fount from which our system developed; a system which has procedures and goals which closely parallel our own. Surely it could not be claimed that the English system is any other than one whose "system of jurisprudence [is] likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, . . ." *Hilton v. Guyot, supra*, at 202. The Court also feels that the recognition and use of this foreign judgment best serves the ends of justice. Defendant, a large Pennsylvania based corporation, after consultation with prominent counsel in both the United States and England, entered an appearance in England. At this juncture the defendant had determined to pursue, at least to some extent, the action in England. Regardless of the issue of mistake, this Court feels that the defendant had crossed its Rubicon. Obviously such action should not be taken lightly and we do not consider it unfair or unjust to hold the corporation bound by the resolution of the issue that it put in litigation and did in fact fully litigate. Furthermore, we find the English procedure with respect to appearances perfectly compatable with the goals of justice and our concept of due process.[8] The conditional appearance allowed by R. S. C., Ord. 12, r. 7 enables the

8. Comment d to § 81 of the Restatement (Second) of Conflicts entitled Special Appearance. What law determines effect of special appearance, states: "An individual subjects himself to the judicial jurisdiction of the state by appearing in an action for the sole purpose of objecting that the court has no jurisdiction over him. It is for each state to determine for itself whether to exercise judicial jurisdiction under such circumstances." While it is true that unlike the English rule, all states of the United States currently refrain from exercising jurisdiction over a defendant where he has appeared solely to challenge the jurisdiction of the court, it is clear that due process does not mandate such a position. Until as recently as 1964, Texas followed the practice of assuming jurisdiction where the defendant made a special appearance. See *York v. Texas*, 137 U. S. 15 (1890).

defendant to assert its jurisdictional defense without otherwise submitting itself to the court's jurisdiction. In the normal situation, it is only after an adverse final determination on the jurisdictional issue that the conditional appearance becomes a general one. The conditional appearance provided for in Rule 7 is couched in terms that require an affirmative act which results in the plaintiff's writ being quashed or the appearance becomes a general one. It was due to this that the defendant's act of entering a conditional appearance in this case resulted in a general appearance without the determination which the special appearance is designed to bring about. The Court does not feel that defendant can complain of this result since it necessarily flowed from its decision not to follow the normal procedure of attacking the writ which it initiated by entering a conditional appearance rather than a general one or none at all.

Moreover, to examine the jurisdictional basis on which the suit was originally predicated, as defendant would have the Court do, would have the effect of rendering meaningless the ruling of the Supreme Court of Judicature. If the English court had decided in favor of the defendant and allowed it to withdraw its appearance the case would have been placed in the same posture that it would have been if the defendant originally had taken no action. The English court would have entered a default judgment which defendant could have collaterally attacked when sued in this Court. If this Court would now examine the underlying jurisdictional issue of whether or not there was a contract which was to be governed by English law, rather than rely on the litigated issue of defendant's appearance, we would be doing exactly what defendant would have accomplished had it been successful in England. This Court will not allow the defendant to do indirectly what it failed to accomplish directly.

RECIPROCITY.

In its brief (p. 13) and supporting affidavit, defendant argues that the English judgment should not be recognized and enforced by this Court because an English court would not enforce an American judgment under similar circumstances. The position that reciprocity is an essential element in determining whether or not to enforce a foreign judgment was first enunciated in 1895 by the Supreme Court in the *Hilton* case. In that case the Court found all of the requisite conditions for enforcement of the French judgment had been met except that a French court, sitting *mutatis mutandis*, would not enforce the American judgment. Therefore the Court refused to give conclusive effect to the French judgment. However, we do not find the teaching of *Hilton* on reciprocity to be controlling in this case. The *Hilton* decision was a pre *Erie R. R. Co. v. Tompkins* case and it has never been suggested that it was constitutionally dictated and therefore binding on the states. It is clear, and this Court has so stated earlier in this opinion,[9] that the law governing the enforceability of foreign judgments by a federal court is the law of the state where the court is located. Therefore, the issue, as this Court perceives it, is whether the courts of Pennsylvania would hold that reciprocity is a necessary precondition to the enforcement of foreign judgments. The issue of the enforceability of foreign judgments has not frequently been litigated in Pennsylvania, and the Court has not been cited to, nor has independent examination revealed any Pennsylvania cases which even intimate that a finding of reciprocity is an essential precondition to their enforcing a foreign judgment.

Since its beginning in *Hilton*, the concept of reciprocity has not found favor in the United States. It has often

9. See page 6, *supra*.

been the subject of criticism by commentators[10] and most courts have refused to follow *Hilton* on this issue. The concept has been expressly rejected by the courts of New York,[11] and has been rejected by statute in California.[12] The courts and commentators have presented cogent reasons for their position that reciprocity should not be the determinative factor in a court's decision on the issue of recognition. The primary reason which has been advanced is that our legal system has adopted a policy that calls for an end to litigation. Whether or not a foreign court would recognize an American judgment is not relevant to this policy. However, it is in furtherance of that objective if litigation which was begun in a foreign court and which is presently before an American tribunal, is brought to an end. The Court finds that the concept of reciprocity is a provincial one, one which fosters decisions that do violence to the legitimate goals of comity between foreign nations. Therefore, absent a positive showing that Pennsylvania would follow the *Hilton* decision with respect to reciprocity, this Court will not presume that it would adhere to such an undermined concept. This Court finds that if presented with the issue, the Pennsylvania courts would follow its neighboring state of New York and expressly reject this concept. We find this to be particularly true since Pennsylvania, like New York, is one of the largest centers of both national and international commercial activities.

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10. E.g., 2 Beale, Conflict of Laws, 1385-89 (1935); Goodrich, Conflict of Laws, 605-08 (3rd ed. 1949); Reese, The Status in This Country of Judgments Rendered Abroad, 50 Col. L. Rev. 783, 790-93 (1950).

11. *Cowens v. Ticonderoga Pulp & Paper Co.*, 219 App. Div. 120, 219 N. Y. S. 284, *aff'd* 246 N. Y. 603 (1927); *Johnston v. Compagnie Generale Transatlantique*, 242 N. Y. 381 (Ct. of Appeals 1926).

12. See Reese, *supra*, n. 10 at 788 n. 29.

PUBLIC POLICY.

Defendant also asserts that to enforce the English judgment would violate the public policy of Pennsylvania since that judgment includes in the award of damages an amount for loss of good will and counsel fees. It is a well-established rule of law that a court will not enforce a foreign judgment, be it of a sister state or foreign nation, if to do so would violate the forum's public policy. The courts of a state will not violate a strong state policy in the vindication of a private wrong regardless of whether or not the judgment would otherwise be entitled to enforcement. The Pennsylvania Supreme Court has stated that it will not enforce a foreign judgment which violates "a positive, well-defined, universal public sentiment, deeply integrated in the customs and beliefs of the people [of this Commonwealth] and in their conviction of what is just and right and in the interests of the public weal." *Christoff Estate*, *supra*, at p. 424 quoting *Mamlin v. Genoe*, 340 Pa. 320, 325 (1941).

In support of its contention that the enforcement of this judgment would violate public policy, defendant has cited Pennsylvania cases which demonstrate that loss of good will and, under normal circumstances, attorney fees, would not be directly recoverable in a similar action instituted in Pennsylvania. *Harry Rubin & Sons, Inc. v. Consolidated Pipe Co.*, 396 Pa. 506 (1959); *Shapiro v. Magaziner*, 418 Pa. 278 (1965). However, merely because the forum has a different rule of law, whether legislatively or judicially founded, does not automatically render the foreign law contrary to the public policy of the forum.[13]

13. E.g., *McCurdy's Estate*, 303 Pa. 453 (1931). See Asher, Public Policy in the Law of Conflicts in Pennsylvania, 13 Temp. L. Rev. 216 (1939).

It has long been the law in Pennsylvania that merely because Pennsylvania would not allow a direct recovery in a particular instance, nevertheless it would, in a choice of law situation, allow such a recovery. E.g. *Dickinson v. Jones*, 309 Pa. 256 (1932). Furthermore, Mr. Justice Stern, speaking for the *Mamlin* court, stated: "[f]amiliar illustrations [of judgments which would not be enforced due to public policy] are those involving unreasonable restraints of marriage or of trade, collusive arrangements for obtaining divorces, suppression of bids for public contracts, interference with freedom of conscience or religion." *Mamlin v. Genoe, supra* at 325. The Court finds that the inclusion of loss of good will and counsel fees in an award of damages is wholly dissimilar to the types of cases enumerated by Mr. Justice Stern. Therefore the Court concludes that while Pennsylvania may not agree that these elements should be included in damages for breach of contract, the variance with Pennsylvania law is not such that the enforcement "tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel, is against public policy." *Goodyear v. Brown*, 155 Pa. 514, 518 (1893).

For all of the above reasons, and since the Court finds that there is no genuine issue as to any material fact, the Court will grant plaintiff's motion for summary judgment.

ORDER.

And Now, to wit, this 2nd day of October, A.D. 1970, it is Ordered that plaintiff's motion for summary judgment be and the same is hereby Granted.

It is FURTHER ORDERED that, due to the ruling in this case, plaintiff's objections to defendant's interrogatories be and the same are hereby SUSTAINED.

AND IT IS SO ORDERED.

JOHN W. LORD, JR., *Ch. J.*

DISTRICT COURT JUDGMENT.

BEFORE JOHN W. LORD, JR., *Ch. J.*

AND NOW, to wit, this 15th day of October, 1970, in accordance with the Opinion and Order of this Court, it is ORDERED that Judgment be and the same hereby is entered in favor of the Plaintiff, Somportex Limited, and against the Defendant, Philadelphia Chewing Gum Corp., in the total sum of $94,387.88 with interest thereon at the rate of four per centum per annum from the 2nd day of July, 1968, together with costs.

AND IT IS SO ORDERED.

JOHN W. LORD, JR.,
John W. Lord, Jr., Ch. J.

APPENDIX B.

COURT OF APPEALS OPINION.

(Filed December 20, 1971.)

ALDISERT, *Circuit Judge.*

Several interesting questions are presented in this appeal from the district court's order granting summary judgment to enforce a default judgment entered by an English court. To resolve them, a complete recitation of the procedural history of this case is necessary.

This case has its genesis in a transaction between appellant, Philadelphia Chewing Gum Corporation, and Somportex Limited, a British corporation, which was to merchandise appellant's wares in Great Britain under the trade name "Tarzan Bubble Gum." According to the facts as alleged by appellant, there was a proposal which involved the participation of Brewster Leeds and Co., Inc., and M. S. International, Inc., third-party defendants in the court below. Brewster made certain arrangements with Somportex to furnish gum manufactured by Philadelphia; M. S. International, as agent for the licensor of the trade name "Tarzan," was to furnish the African name to the American gum to be sold in England. For reasons not relevant to our limited inquiry, the transaction never reached fruition.

Somportex filed an action against Philadelphia for breach of contract in the Queen's Bench Division of the High Court of England. Notice of the issuance of a Writ of Summons was served, in accordance with the rules and with the leave of the High Court, upon Philadelphia at its registered address in Havertown, Pennsylvania, on May

15, 1967. The extraterritorial service was based on the English version of long-arm statutes utilized by many American states.[1] Philadelphia then consulted a firm of English solicitors, who, by letter of July 14, 1967, advised its Pennsylvania lawyers:

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1. The English Statute provides:

> (f) if the action begun by the Writ is brought against a Defendant not domiciled or ordinarily resident in Scotland to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or obtain other relief in respect of the breach of a contract, being (in either case) a contract which—
>
> (i) was made within the jurisdiction, or
>
> (ii) was made by or through an Agent trading or residing within the Jurisdiction on behalf of a principal trading or residing out of the jurisdiction, or
>
> (iii) is by the terms, or by implication, governed by the English law;
>
> (g) If the action begun by the Writ is brought against a Defendant not domiciled or ordinarily resident in Scotland or Northern Ireland, in respect of a breach committed within the jurisdiction of a contract made within or out of Jurisdiction, and irrespective of the fact, if such be the case, that the breach was preceded or accompanied by a breach committed out of the Jurisdiction that rendered impossible the performance of so much of the Contract as ought to have been performed within the Jurisdiction.

Cf., the Pennsylvania Statute authorizing service on a foreign corporation, which provides:

> For the purpose of determining jurisdictions of Courts within this Commonwealth, the doing by any corporation in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object, or doing a single act in this Commonwealth for such purposes, with the intention of thereby initiating a series of such acts shall constitute "doing business". For the purposes of this subsection the shipping of merchandise directly or indirectly into or through this Commonwealth shall be considered the doing of such an act in this Commonwealth.

15 PA. STAT. ANN. § 2011 D.

Pennsylvania decisional law has generously interpreted its long-arm statute. See state cases summarized in *Siders v. Upper Mississippi Towing Corp.*, 423 F. 2d 535 (3rd Cir. 1970).

I have arranged with the Solicitors for Somportex Limited that they will let me have a copy of their Affidavit and exhibits to that Affidavit which supported their application to serve out of the Jurisdiction. Subject to the contents of the Affidavit, and any further information that can be provided by Philadelphia Chewing Gum Corporation after we have had the opportunity of seeing the Affidavit, it may be possible to make an application to the Court for an Order setting the Writ aside. But for such an application to be successful we will have to show that on the facts the matter does not fall within the provision of (f) and (g) [of the long-arm statute, note 1, supra] referred to above.

In the meantime we will enter a conditional Appearance to the Writ in behalf of Philadelphia Chewing Gum Corporation in order to preserve the status quo.

On August 9, 1967, the English solicitors entered a "conditional appearance to the Writ" and filed a motion to set aside the Writ of Summons.[2] At a hearing before a Mas-

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2. The memorandum of conditional appearance was stamped with this formula: "This appearance is to stand as unconditional unless the defendant applies within fourteen days to set aside the writ and service thereof and obtains an order to that effect."

The motion alleged:

(1) that there was no agreement made between the Plaintiffs and Defendants on or about 17th December, 1966;

(2) alternatively that if there was such an agreement:—

(a) it was not made within the jurisdiction of this honourable Court; or

(b) it was not made by or through an agent trading or residing within the jurisdiction on behalf of the Defendants a principal trading or residing out of the jurisdiction; or

ter on November 13, 1967, the solicitors appeared and disclosed that Philadelphia had elected not to proceed with the summons or to contest the jurisdiction of the English Court, but instead intended to obtain leave of court to withdraw appearance of counsel. The Master then dismissed Philadelphia's summons to set aside plaintiff's Writ of Summons. Four days later, the solicitors sought to withdraw their appearance as counsel for Philadelphia, contending that it was a conditional appearance only. On November 27, 1967, after a Master granted the motion, Somportex appealed. The appeal was denied after hearing before a single judge, but the Court of Appeal, reversing the decision of the Master, held that the appearance was unconditional and that the submission to the jurisdiction by Philadelphia was, therefore, effective.[3] But the court

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(c) it was not by its terms or by implication to be governed by English law;

(3) in the further alternative that if there was such an agreement there has been no breach of the said agreement committed within the jurisdiction of this honourable court; . . .

3. *Somportex v. Philadelphia Chewing Gum* [1968], 3 All. E. R. 26, 29, Lord Denning:

In order to decide the point, I think that one has to put oneself in the position of the American company and their advisers when faced with this notice of the writ. They could have not entered an appearance at all, in which case by the law of Pennsylvania they would not be bound by any judgment. Instead of doing that, however, after consultation with a distinguished firm of lawyers in the city of London they decided to enter a conditional appearance. That was a very important step for them to take (especially if they had assets in England or were likely to bring assets into England) because it was an essential way of defending their own position. After all, if they did not enter an appearance at all, and in consequence the English courts gave judgment against them in default of appearance, that judgment could be executed against them in England in respect of assets in England. In order to guard against that eventuality, they had first to enter a conditional appearance here, then argue whether it was within the jurisdiction

let stand "the original order which was made by the master on Nov. 13 dismissing the application to set aside. The writ therefore will stand. On the other hand, if the American company would wish to appeal from the order of Nov. 13, I see no reason why the time should not be extended and they can argue that matter out at a later stage if they should so wish."[4]

Thereafter, Philadelphia made a calculated decision: it decided to do nothing. It neither asked for an extension of time nor attempted in any way to proceed with an appeal from the Master's order dismissing its application to set aside the Writ. Instead, it directed its English solicitors to withdraw from the case. There being no appeal, the Master's order became final.

Somportex then filed a Statement of Claim which was duly served in accordance with English Court rules. In addition, by separate letter, it informed Philadelphia of

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of the court or not. If it was outside the jurisdiction, all well and good. The writ would be set aside. They would go away free. If it was within the jurisdiction, however, their appearance became unconditional and they could fight out the case on the merits. In these circumstances it seems to me that they were very wise to enter a conditional appearance. It was a step which would be advised by any competent lawyer if there was a likelihood that assets would then or afterwards come into England.

We have, therefore, a wise course of action deliberately decided on by eminent firms in England and the United States after consultation, and I do not think that they should be allowed now to go back on it. It must be remembered that, on the faith of this entry of appearance, the English company have altered their position. They have not gone to the United States, as they might have done, and taken steps there against the American company. They have remained in this country and pursued the action here—on the faith that there was a conditional appearance entered which would become unconditional unless it was duly set aside. In the circumstances, I do not think that we should give leave to withdraw the appearance.

4. *Ibid*, 3 All. E. R. at 29, 30.

the significance and effect of the pleading, the procedural posture of the case, and its intended course of action.[5]

Philadelphia persisted in its course of inaction; it failed to file a defense. Somportex obtained a default judgment against it in the Queen's Bench Division of the High Court of Justice in England for the sum of £ 39,562.-10.10 (approximately $94,000.00). The award reflected some $45,000.00 for loss of profit; $46,000.00 for loss of good will and $2,500.00 for costs, including attorneys' fees.

Thereafter, Somportex filed a diversity action in the court below, seeking to enforce the foreign judgment, and attached to the complaint a certified transcript of the

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5. * * *

Accompanying this letter is the Plaintiff's Statement of Claim the service of which upon yourselves is the next step in the action after the entry of your appearance. You will observe that it contains in numbered paragraphs the material facts relied on by our Clients in support of their claim against you. Under the Rules of the Supreme Court in England, you may serve upon us as Solicitors for the Plaintiffs your Defence (should you consider that you have one) in writing within 14 days from the date of service upon you of the Statement of Claim. In view of the fact that Messrs. Clifford-Turner & Company no longer appear to be acting on your behalf, we recognise that you may have some difficulty in preparing and serving your Defence within that time. Accordingly, we are prepared voluntarily to give you an extension of time for the service of your Defence, namely a further 14 days, so that you may have 28 days in all for this purpose. Should you fail to serve your Defence before the expiry of this extended period, the Plaintiffs will proceed to obtain judgment against you in default of Defence. If however you do enter a Defence, the action will then proceed to a trial at which you will have an opportunity of contesting fully and fairly the merits of the Plaintiff's claim.

We have thought it right to draw your attention to the points mentioned above so that you may fully understand your present position in relation to the action now being prosecuted against you. Further we feel bound to inform you that in the event of judgment being obtained against you, the Plaintiffs will week to enforce the judgment against you through the appropriate Court in Pennsylvania.

English proceeding. The district court granted two motions which gave rise to this appeal: it dismissed the third-party complaints for failure to state a proper claim under F. R. C. P. 14; and it granted plaintiff's motion for summary judgment, F. R. C. P. 56(a).

We will quickly dispose of the third-party matter. We perceive our scope of review to be limited to an inquiry whether the district court abused its discretion in refusing impleader.[6] At issue here was not the alleged contract to peddle Tarzan chewing gum in England. Had such been the case, Philadelphia's third-party arguments would have been persuasive. The complaints might have met the liability test and "transaction or occurrence" requirement of F. R. C. P. 14(a).[7] But the transaction at issue here is not the contract; it is the English judgment. And neither third-party defendant was involved in or notified of the proceedings in the English courts. Accordingly, we find no abuse of discretion in the district court's dismissal of the third-party complaints.

Appellant presents a cluster of contentions supporting its major thesis that we should not extend hospitality to

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6. Presumably a court, called upon to exercise its discretion as to impledaer, must balance the desire to avoid circuity of actions and to obtain consistent results against any prejudice that the plaintiff might suffer from complications of the case.

Wright, FEDERAL COURTS, § 76, at 333.

7. F. R. C. P. 14 provides:

(a) *When Defendant May Bring in Third Party.* At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to him for all or part of the plaintiff's claim against him.* . . . The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence *that is the subject matter of the plaintiff's claim against the third-party plaintiff.* . . . Emphasis supplied.

the English judgment. First, it contends, and we agree, that because our jurisdiction is based solely on diversity, "the law to be applied . . . is the law of the state," in this case, Pennsylvania law. *Erie v. Tompkins,* 304 U. S. 64 (1938); *Svenska Handelsbanken v. Carlson,* 258 F. Supp. 448 (D. Mass. 1966).

Pennsylvania distinguishes between judgments obtained in the courts of her sister states, which are entitled to full faith and credit, and those of foreign courts, which are subject to principles of comity. *In re Christoff's Estate,* 411 Pa. 419, 192 A. 2d 737, *cert. denied,* 375 U. S. 965 (1964).

Comity is a recognition which one nation extends within its own territory to the legislative, executive, or judicial acts of another. It is not a rule of law, but one of practice, convenience, and expediency. Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation. Rather, it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws. Comity should be withheld only when its acceptance would be contrary or prejudicial to the interest of the nation called upon to give it effect.[8] See Orfield and Re,

8. In *Hilton v. Guyot,* 159 U. S. 113 (1895), the Supreme Court spoke of the likelihood of reciprocity as a condition precedent to the recognition of comity. The doctrine has received no more than desultory acknowledgment, *Direction der Disconto-Gesellschaft v. U. S. Steel Corp.,* 300 Fed. 741, 747 (S. D. N. Y. 1921); see also *Banco Nacional de Cuba v. Sabbatino,* 376 U. S. 398, 411 (1963) (dictum). It has been rejected by the courts of New York, *Johnston v. Compagnie Generale Transatlantique,* 242 N. Y. 381, 152 N. E. 121 (N. Y. 1926), and by statute in California. See Reese, "The Status of in this Country of Judgments Rendered Abroad," 50 Col. L. Rev. 783, 790-93 (1950).

> We agree with the district court that this issue of the enforceability of foreign judgments has not frequently been litigated in Pennsylvania, and the Court has not been cited to, nor has

INTERNATIONAL LAW, Note, "Recognition and Enforcement of Foreign Judgments and Awards," pp. 736-737.

Thus, the court in *Christoff, supra,* 192 A. 2d at 739, acknowledged the governing standard enunciated in *Hilton v. Guyot, supra,* 129 U. S. at 205:

> When an action is brought in a court of this country, by a citizen of a foreign country against one of our own citizens . . . and the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the course of a civilized jurisprudence, and are stated in a clear and formal record, the judgment is prima facie evidence, at least, of the truth of the matter adjudged; and it should be held conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching the judgment, as by showing that it was affected by fraud or prejudice, or that, by the principles of international law, and by the comity of our own country, it would not be given credit and effect.

It is by this standard, therefore, that appellant's arguments must be measured.

Appellant's contention that the district court failed to make an independent examination of the factual and legal basis of the jurisdiction of the English Court at once argues too much and says too little. The reality is that the court did examine the legal basis of asserted jurisdiction and decided the issue adversely to appellant.

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independent examination revealed any Pennsylvania cases which even intimate that a finding of reciprocity is an essential precondition to their enforcing a foreign judgment.

Somportex Limited v. Philadelphia Chewing Gum. 318 F. Supp. 161, 168 (E. D. Pa. 1970).

Indeed, we do not believe it was necessary for the court below to reach the question of whether the factual complex of the contractual dispute permitted extraterritorial service under the English long-arm statute. In its opinion denying leave of defense counsel to withdraw, the Court of Appeal specifically gave Philadelphia the opportunity to have the factual issue tested before the courts; moreover, Philadelphia was allocated additional time to do just that. Lord Denning said: ". . . They can argue that matter out at a later stage if they should so wish." Three months went by with no activity forthcoming and then, as described by the district court, "[d]uring this three-month period, defendant changed its strategy and, not wishing to do anything which might result in its submitting to the English Court's jurisdiction, decided to withdraw its appearance altogether." Under these circumstances, we hold that defendant cannot choose its forum to test the factual basis of jurisdiction. It was given, and it waived, the opportunity of making the adequate presentation in the English Court.[9]

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9. In *Baldwin v. Iowa State Traveling Mens Association*, 283 U. S. 522 (1931), a federal district court defendant, who had unsuccessfully conditionally appeared and then, like appellant here, failed either to file a defense or to appeal from the default judgment entered on the merits, was sued in another district court for enforcement of the default judgment. The Court emphasized that "the full faith and credit required by [Article IV, Section 1] is not involved, since neither of the courts was a state court." 283 U. S. at 524. The Court then declared:

> "The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over its person. It had the election not to appear at all. If, in the absence of appearance, the court had proceeded to judgment and the present suit had been brought thereon, respondent could have raised and tried out the issue in the present action, because it would never have had its day in court with respect to jurisdiction. . . . . It had also the right to appeal from the decision of the Missouri District Court, as is shown by Harkness v. Hyde, supra, [98 U. S. 476] and the other authorities cited. It elected to follow neither of those courses, but, after having been defeated upon full hearing

Additionally, appellant attacks the English practice wherein a conditional appearance attacking jurisdiction may, by court decision, be converted into an unconditional one. It cannot effectively argue that this practice constitutes "some special ground . . . for impeaching the judgment," as to render the English judgment unwelcome in Pennsylvania under principles of international law and comity because it was obtained by procedures contrary or prejudicial to the host state. The English practice in this respect is identical to that set forth in both the Federal and Pennsylvania rules of civil procedure.[10] F. R. C. P. 12(b)(2) provides the vehicle for attacking jurisdiction over the person, and, in *Orange Theatre Corp. v. Hayherstz Amusement Corp.*, 139 F. 2d 871, 874 (3d Cir. 1944), we said that Rule 12 "has abolished for the federal courts the age-old distinction between general and special appearances."[11]

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in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.

"Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

283 U. S. at 525-26.

The *Baldwin* principle was reaffirmed in *Durfee v. Duke*, 375 U. S. 106, 111 (1963). See also, *American Surety Co. v. Baldwin*, 287 U. S. 156, 166 (1932), in which Mr. Justice Brandeis stated that "the principles of *res judicata* apply to questions of jurisdiction as well as to other issues."

10. "The time-honored recital of a 'special appearance' has no place under the rules." Wright, FEDERAL COURTS, § 66 at 279.

11. The Supreme Court has upheld the constitutionality of Texas statutes providing that a special appearance for a non-resident defendant for the purpose of pleading to the jurisdiction is a voluntary appearance which brings the defendant into court for all purposes. *York v. Texas*, 137 U. S. 15 (1890). See Cound, Frieden-

Similarly, a conditional or "*de bene esse*" appearance no longer exists in Pennsylvania.[12] *Monaco v. Montgomery Cab Co.*, 417 Pa. 135, 208 A. 2d 252 (1965), Pa. R. C. P. 1451(7). A challenge to jurisdiction must be asserted there by a preliminary objection raising a question of jurisdiction. Pa. R. C. P. 1017(b)(1).

Thus, we will not disturb the English Court's adjudication. That the English judgment was obtained by ap-

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thal, and Miller, CIVIL PROCEDURE, CASES AND MATERIALS, "Challenging the Jurisdiction of the Court," pp. 150-57. See also *Des Moines Navigation & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552, 8 S. Ct. 217, 31 L. Ed. 202 (1887).

12. Appellant attaches much significance to the July 14, 1967, letter of its English solicitors, *supra*, wherein its American counsel were told: "we will enter a conditional Appearance to the Writ in behalf of Philadelphia Chewing Gum Corporation in order to preserve the status quo." From that it builds the argument that it cannot be said to have ever consented to have entered an appearance which would have subjected it to the court's jurisdiction. In support thereof it contends that it and its American counsel took the phrase "conditional appearance" to mean *de bene esse*. The argument is totally without merit. We can perceive of no principle of law which removes one from the reach of a court's jurisdiction because of misunderstanding or misimpression by one counsel of advice from privately retained co-counsel. Moreover, as heretofore observed, the conditional appearance was described by Lord Denning in *Somportex v. Philadelphia Chewing Gum*, 3 All. E. R. 26, 27:

> "the memorandum of conditional appearance was stamped with the usual formula: 'This appearance is to stand as unconditional unless the defendant applies within fourteen days to set aside the writ and service thereof and obtains an order to that effect.'"

It can also be said that appellant may be estopped from advancing this argument before this court. *Scarano v. Central R. Co. of New Jersey*, 203 F. 2d 510 (3rd Cir. 1953). In the district court, its counsel stated:

> "The English Court decided that a conditional appearance was a general appearance. We are not asking this court to redetermine that issue. We are saying that even assuming the English Court was correct, that judgment is not entitled to comity; no cases support it. Thank you."
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> THE COURT: Now do you agree that the issue as to mistake in the law was litigated in the English Courts?
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> COUNSEL: Yes, sir.

pellant's default instead of through an adversary proceeding does not dilute its efficacy. In the absence of fraud or collusion, a default judgment is as conclusive an adjudication between the parties as when rendered after answer and complete contest in the open courtroom. *Morris v. Jones*, 329 U. S. 545 (1947); *Third National Bank v. Atlantic City*, 130 F. 751, 754 (3d Cir. 1904); *Lockhart v. Mercer Tube and Mfg. Co.*, 53 F. Supp. 301 (D. Del. 1963).[13] The polestar is whether a reasonable method of notification is employed and reasonable opportunity to be heard is afforded to the person affected. Restatement (Second) Conflict of Laws, § 92 (Proposed Final Draft), 1967.

English law permits recovery, as compensatory damages in breach of contract, of items reflecting loss of good will and costs, including attorneys' fees. These two items formed substantial portions of the English judgment. Because they are not recoverable under Pennsylvania law,[14] appellant would have the foreign judgment declared unenforceable because it constitutes an ". . . action on the foreign claim [which] could not have been maintained because contrary to the public policy of the forum," citing

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13. "A judgment of a court having jurisdiction of the parties and the subject matter operates as res adjudicata, in the absence of fraud or collusion, even if obtained upon a default." *Riehle v. Margolies*, 279 U. S. 218, 225 (1929).

Throughout the limited number of cases which have permitted a collateral attack on a default judgment entered in another court runs the recurring theme of "fraud" or "excusable neglect." *Butner v. Neustadter*, 324 F. 2d 783 (9th Cir. 1963); *cf., Bass v. Hoagland*, 172 F. 2d 205 (5th Cir. 1949). See Carrington, CIVIL PROCEDURE, "Default Judgments," pp. 786-90.

14. Loss of good will is not recoverable under Pennsylvania law. *Harry Rubin & Sons, Inc. v. Consolidated Pipe Co.*, 396 Pa. 506, 153 A. 2d 472 (1959); the same is true of attorneys' fees, *Shapiro v. Magaziner*, 418 Pa. 278, 210 A. 2d 890 (1965).

Restatement, Conflict of Laws, § 445.[15] We are satisfied with the district court's disposition of this argument:

> The Court finds that . . . while Pennsylvania may not agree that these elements should be included in damages for breach of contract, the variance with Pennsylvania law is not such that the enforcement "tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel, is against public policy." Goodyear v. Brown, 155 Pa. 514, 518 (1893).

Somportex Limited v. Philadelphia Chewing Gum Corp., 318 F. Supp. 161, 169 (E. D. Pa. 1970).

Finally, appellant contends that since "it maintains no office or employee in England and transacts no business within the country" there were no insufficient contacts there to meet the due process tests of *International Shoe Co. v. Washington*, 326 U. S. 310 (1965). It argues that, at best, "the only contact Philadelphia had with England was the negotiations allegedly conducted by an independent New York exporter by letter, telephone and telegram to sell Philadelphia's products in England." In *Hanson v.*

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15. The limited scope of public policy as a controlling principle of Pennsylvania jurisprudence was underscored by Justice Stern in *Mamlin v. Genoe*, 340 Pa. 320, 325, 17 A. 2d 407, 409 (1941):

> "It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the community in so declaring. . . . Familiar illustrations are those involving unreasonable restraints of marriage or of trade, collusive arrangements for obtaining divorces, suppression of bids for public contracts, interference with freedom of conscience or religion. . . . Only in the clearest cases, therefore, may a court make an alleged public policy the basis of judicial decision."

Denckla, 357 U.S. 235, 253 (1958), Chief Justice Warren said: "The application of [the requirement of contact] rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting business within the forum state, thus invoking the benefits and protection of its laws." We have concluded that whether the New York exporter was an independent contractor or Philadelphia's agent was a matter to be resolved by the English Court. For the purpose of the constitutional argument, we must assume the proper agency relationship. So construed, we find his activity would constitute the "quality and nature of the defendant's activity" similar to that of the defendant in *McGee v. International Life Ins. Co.*, 355 U. S. 22 (1957), there held to satisfy due process requirements.[16]

For the reasons heretofore rehearsed we will not disturb the English Court's adjudication of jurisdiction; we have deemed as irrelevant the default nature of the judgment; we have concluded that the English compensatory damage items do not offend Pennsylvania public policy; and hold that the English procedure comports with our standards of due process.

In sum, we find that the English proceedings met all the tests enunciated in *Christoff, supra*. We are not persuaded that appellant met its burden of showing that the British "decree is so palpably tainted by fraud or prejudice as to outrage our sense of justice, or [that] the process of the foreign tribunal was invoked to achieve a result contrary to our laws of public policy or to circumvent our laws or public policy." *Christoff, supra*, 192 A. 2d at 739.

The judgment of the district court will be affirmed.

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16. See also *Benn v. Linden Crane Co.*, 326 F. Supp. 995 (E. D. Pa. 1971).

COURT OF APPEALS JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed October 15, 1970, be, and the same is hereby affirmed, with costs taxed against appellant.

ATTEST:

THOMAS F. QUINN,

Clerk.

December 20, 1971.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 8 1972
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971.

No. 71-1020.

PHILADELPHIA CHEWING GUM CORPORATION,
Petitioner,

v.

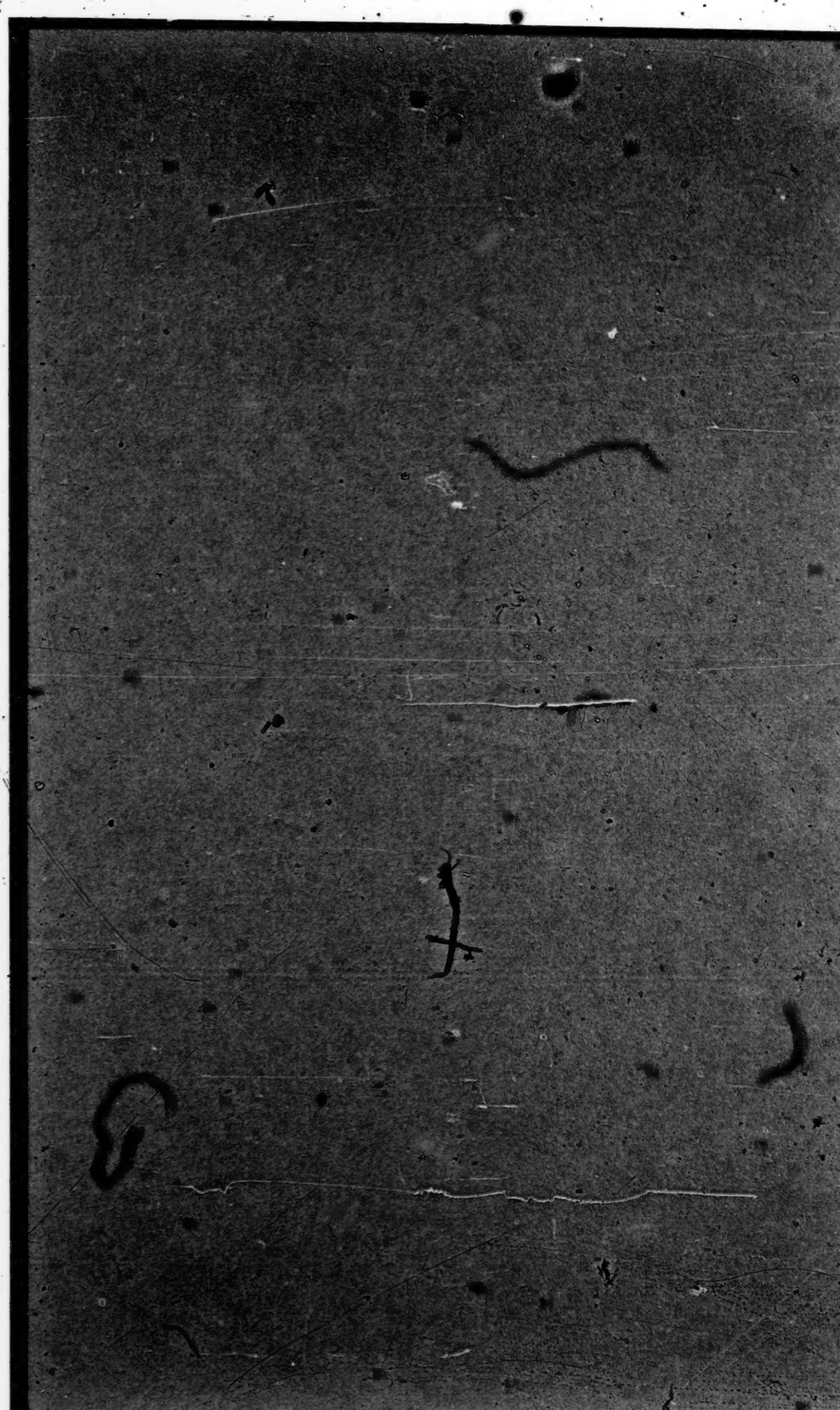
SOMPORTEX LIMITED, BREWSTER LEEDS & CO., INC. and M. S. INTERNATIONAL, INC.,
Respondents.

BRIEF IN OPPOSITION ON BEHALF OF SOMPORTEX LIMITED.

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STATEMENT OF THE CASE.

This case arises under the diversity jurisdiction of the federal courts. Somportex Limited, an English corporation, brought suit in the United States District Court for the Eastern District of Pennsylvania seeking enforcement of an English judgment against Philadelphia Chewing Gum Corporation. After extensive briefing and oral argument the District Court granted summary judgment in favor of Somportex Limited.

Philadelphia Chewing Gum Corporation appealed this decision to the United States Court of Appeals for the Third Circuit. After briefs were filed the Court of Appeals granted oral argument. The Court of Appeals rendered a decision affirming the District Court.

Philadelphia Chewing Gum Corporation then filed a petition for a writ of certiorari.

ARGUMENT.

The petition should be denied for several reasons: the Court of Appeals correctly applied Pennsylvania law; no substantial federal question is presented; the decision is based to a great degree on the unique facts of the case and has no universal importance; the decision of the Court of Appeals is correct.

The Court of Appeals correctly applied the law of Pennsylvania. The suit involves a claim between an English citizen and a Pennsylvania citizen and arises under the diversity jurisdiction of the federal courts. The central issue in the case concerned the effect Pennsylvania would give to an English judgment rendered against a Pennsylvania citizen. Both the District Court and the Court of Appeals correctly applied the controlling Pennsylvania law as stated in *Christoff Estate,* 411 Pa. 419 (1963), cert. denied, 375 U. S. 965 (1964). The question of what effect Pennsylvania accords a foreign judgment is a purely state law question and the federal courts are bound by the decision of the highest Court of the State. After the decision in *Erie R. R. Co. v. Tompkins,* 304 U. S. 64 (1938) there is no authority for federal common law on the issue of comity in a case arising under diversity of citizenship jurisdiction. The petition makes no claim that the Court of Appeals misconstrued the decisional law of Pennsylvania. Respondent therefore asserts that there is no basis for a writ of certiorari.

The case raises no substantial federal question. Moreover, a review of the petition reveals no substantial federal question or important issue of law which requires review by the Supreme Court of the United States. Petitioner cites no contrary state or federal cases. The case concerns factual issues and the application of State law to those facts.

The decision below is to a large extent based on the unique facts of this case and therefore has no universal significance. As the petition underscores in its lengthy statement of the case, the facts involved are complicated. Simply stated petitioner, Philadelphia Chewing Gum Corporation, was served with process in a contract suit filed in England. Petitioner entered an appearance in the English Courts and unsuccessfully contested jurisdiction. Thereafter petitioner unsuccessfully attempted to withdraw its appearance. Petitioner, despite the warning of the English Court, then refused to continue in the lawsuit and a default judgment was entered. This suit was commenced to enforce the judgment. The legal basis of the jurisdiction of the English Court was examined by the District Court and the Court of Appeals and the issue was decided adversely to the petitioner. The judgment was therefore enforced by the District Court and the Court of Appeals under Pennsylvania Law. To the extent that the admittedly unique facts leading to the default judgment are involved in the decision, it is submitted by Respondent that they substantially reduce the universal impact of the case.

The decision of the Court of Appeals is correct. Petitioner does not assert that the Court of Appeals misapplied Pennsylvania Law. The attack appears to be that there was no determination of the factual and legal bases of the jurisdiction of the English Court. This argument was considered and correctly rejected by the Court of Appeals:

> Appellant's contention that the district court failed to make an independent examination of the factual and legal basis of the jurisdiction of the English Court at once argues too much and says too little. The reality is that the court did examine the legal

basis of asserted jurisdiction and decided the issue adversely to appellant.

Moreover, as the Court of Appeals pointed out, petitioner was granted and rejected an offer to fully litigate the issue of jurisdiction in the English Court after entering its appearance.

CONCLUSION.

For all the reasons stated above and those more fully set forth in the decision of the district court and the Court of Appeals the petition should be denied. No review is necessary for this case which arises under the diversity jurisdiction of the federal courts because the court below correctly applied state law as determined by the highest court of the State.

Respectfully submitted,

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1020

Supreme Court, U. S.
FILED
MAR 9 1972
MICHAEL RODAK, JR., CLERK

PHILADELPHIA CHEWING GUM CORPORATION
Petitioner

v.

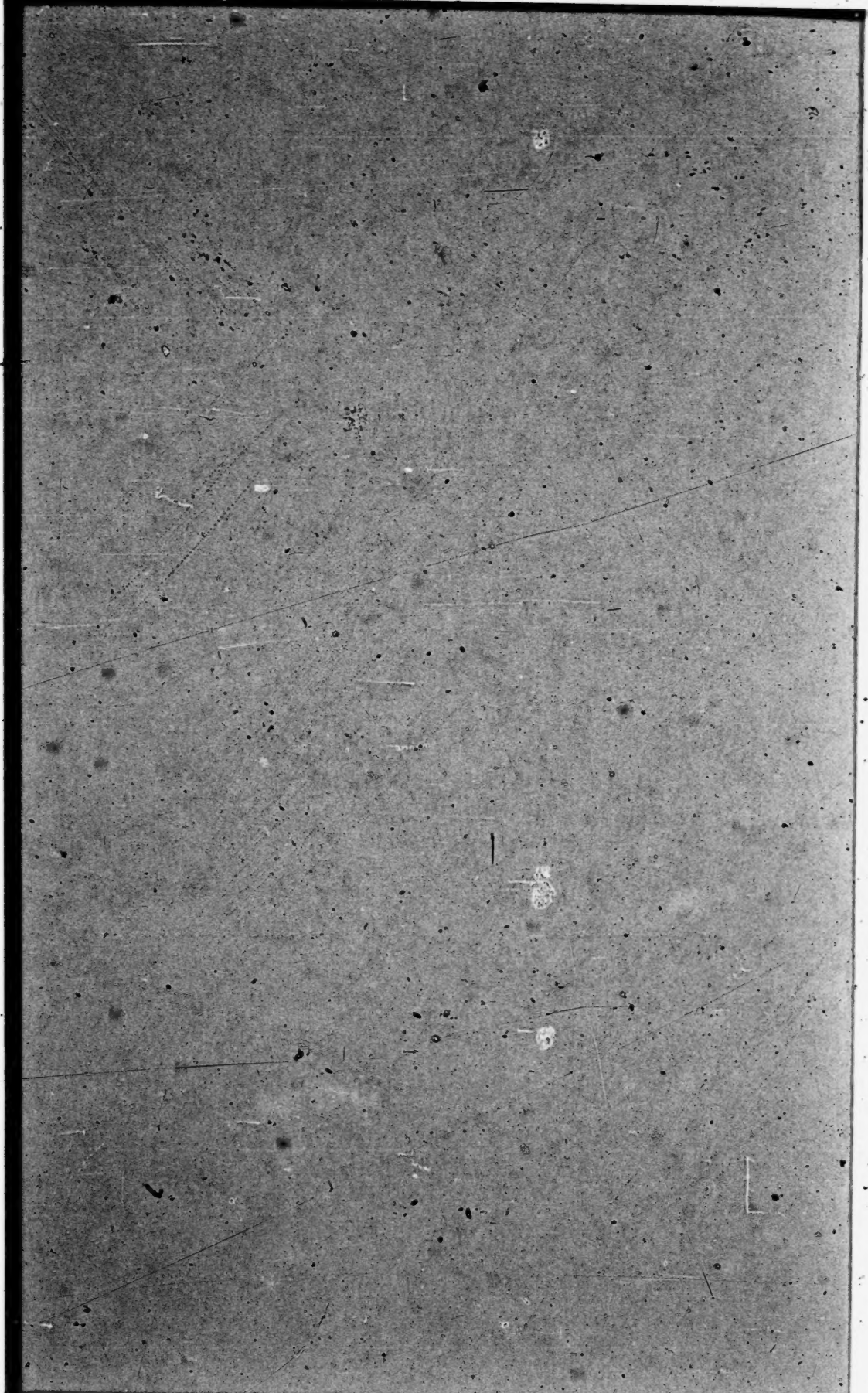
SOMPORTEX LIMITED, BREWSTER LEEDS & CO., INC. and M.S INTERNATIONAL, INC.
Respondents

BRIEF ON BEHALF OF RESPONDENT M S INTERNATIONAL, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1971. No. 71-1020

PHILADELPHIA CHEWING GUM CORPORATION
Petitioner

v.

SOMPORTEX LIMITED, BREWSTER LEEDS & CO., INC. and M S INTERNATIONAL, INC.
Respondents

BRIEF ON BEHALF OF RESPONDENT M S INTERNATIONAL, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Did the District Court err in dismissing, and did the Circuit Court of Appeals err in affirming the dismissal of, the Third Party Complaint of Petitioner, Philadelphia Chewing Gum Corporation, ("Philadelphia") against Respondent M S International, Inc. ("M S") for failure to state a claim upon which relief could be granted against M S as a Third Party Defendant under FED. R. CIV. P. 14(a)?

STATEMENT OF THE CASE

Emphasis is supplied with respect to the nature of the British judgment sought to be enforced—a *default* judgment.

Whether or not M S was "given notice" of the English action, Petitioner has admitted that no allegation of such notice was in the record and that the District Court did not base its decision, dismissing the Third Party Complaint, on that omission. (Appellant's Brief in the 3d Cir., p. 30, fn. 2: "Although Philadelphia did not allege such notice in the Third Party Complaint, the District Court did not base its decision on the omission. . . .")

ARGUMENT

The Petition for a Writ of Certiorari fails to set forth a single important or special reason for Your Honorable Court to exercise its discretion and grant judicial review of the Third Party Defendant aspect of this case under FED. R. CIV. P. 14(a). No Courts of Appeals decisions are designated as being in conflict. Nor are the decisions of the courts below in this action shown to be in conflict with any applicable decisions of this Court. The impleader issue in this case is not even labeled by Petitioner an important question of Federal law which has not previously been settled by this Court. Accordingly, Your Honorable Court is respectfully urged to decline granting Certiorari, permitting the unanimous judgment of five judges below to resolve this aspect of the case.

Not finding any conflicting decisions bearing on the Third Party Defendant practice herein, Petitioner has in its brief created and then refuted arguments divorced from the actualities of the case and from the basis of the lower court's determination. Petitioner admitted in its brief filed with the Third Circuit Court of Appeals that the District Court did not base its decision, dismissing the Third Party Complaint, on Petitioner's failure to allege notice to M S of the English action. Petitioner now requests this Court, in effect, to reverse and remand on this aspect of the case so Petitioner might be given an opportunity to amend its allegation and prove such notice, the omission of which was admittedly not a basis for the lower Court's determination. For Petitioner to seek certiorari on an issue Petitioner admitted was irrelevant to the underlying judgment bespeaks its own denial.

Regardless of the "transaction or occurrence" language in Judge Aldisert's opinion below, the authorities are uniform in their holding:

> "A defendant cannot assert an entirely separate claim against a third party under Rule 14, even

though it arises out of the same general set of facts as the main claim." 3 MOORE, FEDERAL PRACTICE (2d Ed.) 512.

See *U. S. v. Dobroiolski*, 15 F.R.D. 134, 136 (D. Md. 1954), in which the Court refused to implead a third party defendant if so doing would introduce a controversy unrelated to the claim of plaintiff against defendant and would unduly complicate the case. See also 3 MOORE, *supra*, at 505; *Patrick v. Beasley*, 15 F.R.D. 204 (S.D.N.Y. 1953).

CONCLUSION

No compelling reasons having been advanced to the contrary, with respect to the Third Party Defendant aspect of this case certiorari should be denied.

Respectfully submitted,

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RY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1971.

Supreme Court, U. S.
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No. 71-1020

PHILADELPHIA CHEWING GUM CORPORATION,
Petitioner,

v.

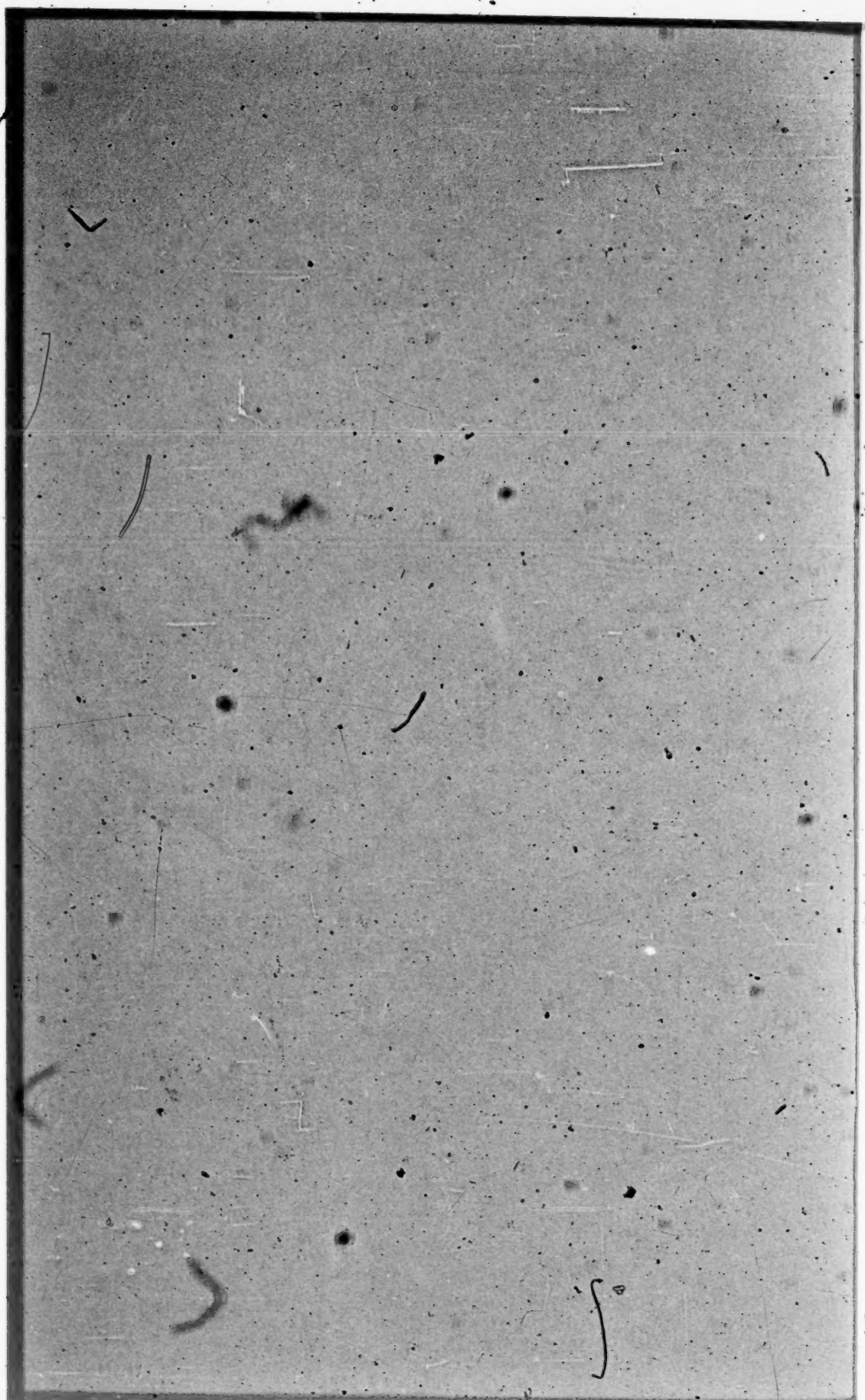
SOMPORTEX LIMITED, BREWSTER LEEDS & CO., INC. and M. S. INTERNATIONAL, INC.,
Respondents.

BRIEF FOR RESPONDENT BREWSTER LEEDS & CO., INC. IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971.

No. 71-1020.

PHILADELPHIA CHEWING GUM CORPORATION,
Petitioner,

v.

SOMPORTEX LIMITED, BREWSTER LEEDS & CO., INC. AND M. S. INTERNATIONAL, INC.,
Respondents.

BRIEF FOR RESPONDENT BREWSTER LEEDS & CO., INC. IN OPPOSITION.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported as *Somportex Limited v. Philadelphia Chewing Gum Corporation*, 318 F. Supp. 161 (E. D. Pa. 1970) and is printed in Appendix A to the Petition. The opinion of the United States Court of Appeals for the Third Circuit, which is not yet reported, is printed in Appendix B to the Petition.

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit was entered on December 20, 1971. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Whether the District Court abused its discretion in refusing to allow a defendant in an action on a foreign judgment to implead in the action a third party who defendant claims is liable over to it for an alleged breach of duty which preceded the entry of the foreign judgment.

STATUTE INVOLVED.

Federal Rule of Civil Procedure 14(a) provides in pertinent part:

> "At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. . . . The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff

arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counter-claims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant. . . ."

STATEMENT OF THE CASE.

Somportex Limited ("Somportex") brought an action in the United States District Court for the Eastern District of Pennsylvania to enforce a default judgment obtained by it against petitioner Philadelphia Chewing Gum Corporation ("Philadelphia") in the Queen's Bench Division of the English High Court of Justice ("English Court") (Rec. 5).[1] Jurisdiction was based on diversity of citizenship under 28 U. S. C. § 1332(a)(2) and (c).

In its answer, Philadelphia raised issues relating to the propriety of service of process, jurisdiction of the English Court, the validity of the judgment and whether it was entitled to recognition by the District Court. Philadelphia denied that the English Court had acquired jurisdiction over it or otherwise had power to enter the judgment and alleged that the judgment of the English Court could not be enforced as a matter of comity because of this lack of jurisdiction and for the additional reason that the judgment included elements of damage and costs not recoverable under the public policy of Pennsylvania.

Philadelphia filed a third party complaint against respondents Brewster Leeds & Co., Inc. ("Brewster") and M. S. International, Inc. ("M. S.") on the ground that they were liable over to Philadelphia for any liability of Philadelphia to Somportex under judgment of the English Court (Rec. 40). Brewster moved to dismiss the third party complaint as to it on the grounds (1) that it failed to state a claim against it and (2) that in the context of the present action, the use of third-party practice under Rule 14(a) was inappropriate (Rec. 57). The motion was granted by the District Court and the third party action was dismissed. The District Court also granted a similar motion by M. S.

1. All references to "Rec." are to petitioner-appellant's printed Appendix in the United States Court of Appeals for the Third Circuit, a certified copy of which has been filed with this Court.

Philadelphia's application to the District Court for a determination and direction, under Rule 54(b), that the orders dismissing the third party complaint be made immediately appealable was denied (Rec. 67).

Some 10 months later, the District Court granted Somportex' motion for summary judgment (Rec. 125), holding that the English judgment was validly obtained and enforceable. The Court entered judgment in favor of Somportex and against Philadelphia in the sum of $94,387.88, with interest (Rec. 141).

Philadelphia appealed to the United States Court of Appeals for the Third Circuit from the summary judgment entered against it and also from the previous interlocutory order of the District Court dismissing the third party actions against Brewster and M. S. The Court of Appeals affirmed the District Court in all respects, holding, with respect to the dismissal of the third party complaint:

> "We will quickly dispose of the third-party matter. We perceive our scope of review to be limited to an inquiry whether the district court abused its discretion in refusing impleader. At issue here was not the alleged contract to peddle Tarzan chewing gum in England. Had such been the case, Philadelphia's third-party arguments would have been persuasive. The complaints might have met the liability test and 'transaction or occurrence' requirement of F. R. C. P. 14(a). But the transaction at issue here is not the contract; it is the English judgment. And neither third-party defendant was involved in or notified of the proceedings in the English courts. Accordingly, we find no abuse of discretion in the district court's dismissal of the third-party complaints." (Appendix A to Petition, A23—footnotes omitted.)

ARGUMENT.

The District Court exercised its discretion under Rule 14(a) in refusing to allow Philadelphia to implead Brewster as a third-party defendant. The Court of Appeals, recognizing the District Court's discretion in such matters, found no abuse of that discretion and affirmed the action of the District Court. The determination by the Court of Appeals that there was no abuse of discretion in the District Court's dismissal of the third-party complaint was clearly correct, and we submit that this determination presents no question which warrants review by this Court.

The Complaint Was Based Solely on the English Judgment and Does Not Allege Any Independent Underlying Cause of Action.

Rule 14(a) of the Federal Rules of Civil Procedure requires that the third-party defendant be liable to the defendant for all or part of the plaintiff's claim against the defendant. "Impleader is not permissible unless these conditions are complied with; it is not a device for bringing into action any controversy which may happen to have some relationship with it." 3 Moore, Federal Practice ¶ 1404 at 502. See *Non-Ferrous Metals, Inc. v. Saramar Aluminum Company*, 25 F. R. D. 102, 104 (N. D. Ohio 1960).

As stated by Professor Moore,

> "[A] defendant cannot assert an entirely separate claim against a third party under Rule 14, even though it arises out of the same general set of facts as the main claim; there must be an attempt to pass on to the third party all or part of the liability asserted against the defendant." 3 Moore, Federal Practice ¶ 1407 at 512.

Somportex' claim was predicated solely upon the judgment which it obtained by default in England.[2] It did not allege any underlying breach of contract claim, and did not seek, in the alternative, a judgment on its underlying claim in the event the foreign judgment was determined to be defective. Thus, if Somportex was not entitled to obtain a judgment based upon the foreign judgment, its complaint would have been subject to dismissal.

In the present action, Somportex' claim was premised solely on the default judgment which it obtained in England, and the underlying merits of that judgment were not relevant except as they affected the jurisdiction of the English Court. Thus, except to the extent that the merits may have had bearing upon the question of jurisdiction, they were not relevant, and, indeed, Brewster would not, and could not, have litigated any issues with respect thereto. See *Schutter Candy Company v. Stein Bros. Paper Box Company*, 371 F. 2d 340, 342 (7th Cir. 1966).

Furthermore, it is clear that for a prior judgment to serve as a basis for indemnification in a subsequent suit, the person claiming a right to indemnification must both give adequate notice of the action and request that the indemnitor step in and defend the action. *Crawford v. Popé and Talbot, Inc.*, 206 F. 2d 784 (E. D. Pa. 1953). See also RESTATEMENTS, JUDGMENTS § 107 and particularly comment (e) thereof. The third-party defendant must be permitted to take part in the trial and to conduct examination and cross-examination of the plaintiff on the merits. *Wiggins v. City of Philadelphia*, 331 F. 2d 521, 529 (3rd Cir. 1964); *Hagans v. Ellerman & Buckuall Steamship Company, Ltd.*, 318 F. 2d 563 (3rd Cir. 1963).

Here, the Court of Appeals properly found that "neither third-party defendant was involved in or notified

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2. Paragraph 2 of the complaint states, "Plaintiff's claim is based upon a default judgment entered against defendant in * * * England."

of the proceedings in the English courts," a finding clearly consistent with the record below. Since Brewster would not be liable to Philadelphia for liability arising out of the default judgment, the judgment could not be used as the basis for a third-party claim against Brewster.

The Third-Party Complaint Fails to State a Proper Claim for Indemnity Against Brewster Under Rule 14(a).

As noted above, Rule 14 of the Federal Rules of Civil Procedure requires that the third-party defendant be liable to the defendant for all or part of the plaintiff's claims against the defendant. Here, Philadelphia only claims that Brewster is liable to Somportex. In paragraph 3 of its third-party complaint, Philadelphia alleged that Brewster has "* * * acted solely as a principal in negotiations with plaintiff * * *." Philadelphia thus charged that Brewster is directly liable to plaintiff Somportex. Accordingly, Philadelphia failed to state a proper claim against Brewster under Rule 14.

The District Court Did Not Abuse Its Discretion.

Even assuming that the third-party complaint was one which the District Court might have allowed under Rule 14(a), the District Court did not abuse its discretion in refusing to permit impleader in this action. As pointed out by the Court of Appeals, a Court, "called upon to exercise its discretion as to impleader, must balance the desire to avoid circuity of actions and to obtain consistent results against any prejudice that the plaintiff might suffer from complications of the case."

As the Court of Appeals properly perceived, the real issue before the District Court was the validity and enforceability of the foreign judgment rather than the merits of the underlying cause of action. The issue was not Somportex' right to recovery on the merits, but rather

whether the District Court should enforce the foreign judgment based upon principles of comity. The District Court obviously concluded, and the Court of Appeals found no abuse of discretion in the determination, that it would only unnecessarily complicate the proceeding to allow the defendant to implead parties against whom the defendant asserted rights arising out of the business relationships preceding the entry of the foreign judgment. Subsequent proceedings in the case have confirmed the wisdom of the District Court.

The original parties litigated in the District Court for another ten months over the events leading to the jurisdiction of the English court and the enforceability of the judgment, attempting to resolve numerous issues raised by the complaint and answer. The presence of Brewster Leeds and M. S. would have served no purpose except to have complicated the proceedings in the District Court.

The refusal to permit impleader did not result in the impairment of any right to indemnification which may exist. The effect of the District Court's ruling was merely to defer for possible independent action any claims which the defendant may assert over against the third-party defendants in the event the foreign judgment is sustained. It was the judgment of the District Court that such claims should not be permitted to complicate an already complicated dispute between plaintiff and defendant regarding the enforceability of the foreign judgment. We submit that this determination by the District Court did not constitute an abuse of discretion, and it was on this basis on which the Court of Appeals properly affirmed.